

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL
OF
ALABAMA

For the Period
July 1, 1949
Through September 30, 1949
Volume No. 56

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from July 1, 1949, through September 30, 1949.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report to be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,
Attorney General.

THE MONTGOMERY ADVERTISER

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OPINIONS

July 12, 1949.

Hon. J. P. Shaffer, Clerk,
Montgomery County Board of Revenue,
Montgomery 4, Alabama.

Gasoline—Montgomery County—Taxation.

1. Liquid motor fuels used in internal combustion engines, producing electric power or furnishing power directly, are subject to tax under Act No. 271, Local Acts 1943, page 157, which authorizes the governing body of Montgomery County to impose an excise tax on the sale, distribution, storage or withdrawal of such fuel.

2. Liquid motor fuels used in diesel and other internal combustion engines by railroads are subject to tax under the provisions of this Act.

3. Liquid motor fuels used in internal combustion engines on tractors and like machinery are subject to tax under the provisions of this Act.

4. The 5-year period of limitation, as provided by Title 7, Section 22, Code of Alabama 1940, is applicable to actions brought under this Act for the recovery of amounts claimed for delinquent taxes.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of May 13, 1949, is as follows:

"Under a local act of 1943 (Local Acts 1943—page 157) there was assessed an excise tax of one cent a gallon on gasoline for the maintenance of the Public School System of Montgomery County.

"Section 1 of this act reads in part as follows: 'The term "gasoline" as used in this Act shall include gasoline, naptha and other liquid motor fuels or any devices or substitutes therefor commonly used in internal combustion engines, provided that nothing contained in this Act shall apply to those products commonly known as kerosene oil, fuel oil and crude oil used for lighting and heating purposes. - - -'

"Please give me your official opinion on the following questions:

"1. Are all liquid motor fuels used in stationary internal combustion engines producing electric power or furnishing power direct, subject to the tax imposed under this Act.

"2. Are all liquid motor fuels used in diesel and other internal combustion engines used on the railroads, subject to the tax as imposed by this Act.

"3. Are all liquid motor fuels used in internal combustion engines for tractors and other like machinery subject to the tax as imposed by this Act.

"4. If your answer to 1, 2 and/or 3 is in the affirmative, for what period of time can the county assess this tax against offenders."

Your questions concerning certain provisions of Act No. 271, Local Acts 1943, page 157, approved June 24, 1943, are somewhat general in their use of the word "all." It is obvious that there are certain exceptions to the taxability of liquid motor fuels which are contained in the Act itself. For example, in Section II, of the Act, (page 158) there is an exception "if the excise tax imposed by this Act upon the sale of such gasoline shall have been paid by a distributor or by a retail dealer or storer, such payment shall be sufficient, the intention being that the tax shall not be paid but once." I shall not attempt to delineate all of the exceptions contained in this Act. My answers to your questions will assume these exceptions, and your knowledge of them. It is necessary to impose such a qualification on the use of the word "all."

1. Your first question appears to be directed to the provisions in Section I of the Act exempting certain fuels used for lighting or heating purposes. Clearly, "gasoline, naptha (sic), and other liquid motor fuels or any devices or substitutes therefor commonly used in internal combustion engines" are taxable. It is apparent from the legislative history of the 1943 Act that kerosene, fuel oil and crude oil which are not used for lighting or heating purposes are also taxable. For the Act's predecessor, Act No. 75, Local Acts 1939, page 37, approved March 1, 1949, provided: ". . . that nothing contained in this Act shall apply to those products generally known as 'kerosene oil,' 'fuel oil' or 'crude oil.'" The addition of "lighting or heating purposes" in the later Act certainly was meant to restrict the exemption for kerosene, fuel oil, and crude oil to such use.

The next problem in your Question 1 is whether or not fuels used in internal combustion engines which produce electric power or furnish that power directly are subject to tax. This question, in turn, depends on whether or not this Act intended that a direct use of the fuels for heating or lighting purposes was necessary in order to obtain an exemption. I believe that the Legislature did intend to restrict the exemption to direct use. Certainly, if the electric power is used for lighting purposes, the role of the liquid motor fuel, which produced the power, is extremely indirect at best. I do not believe that the Legislature contemplated such an extension of the exemption for lighting and heating purposes created in Section I of the Act. It is trite, but nevertheless important, to add that exemptions in tax statutes are construed strictly against the taxpayer, and in favor of the taxing authority. *Touart v.*

American Cyanamid Co., 250 Ala. 551, 35 So. 2d 484. Therefore, the motor fuel described in Question 1 is subject to tax under this Act.

2. The problem presented in your Question 2 would seem to involve the "Commerce Clause" of the Federal Constitution. (Art. I, Sec. 8, U. S. Const.) This is not a tax on an interstate sale. The sale is local, or the distribution, storage, or withdrawal is local. The only objection would be that the tax is levied on an instrumentality in interstate commerce—i. e., the railroad. This is no objection under the leading case of **Southern Pacific Co. v. Gallagher**, 306 U. S. 167, 83 L. Ed. 586. In that case a California use tax, imposed upon the storage and use of equipment bought by the railroad from out of state, was upheld, even though the materials purchased were used by the railroad as part of its transportation facilities in interstate commerce. The Southern Pacific Company handled intra-state, interstate and foreign commerce over its railroad system. The court stated at page 177:

"We think there was a taxable moment when the former (the out-of-state articles) had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun."

Since sales taxes and use taxes have been considered as complementary taxes, the reasoning of the **Southern Pacific Case** is applicable to the instant situation. See also: **Memphis Natural Gas Company v. Stone**, 335 U. S. 80, 92 L. Ed. 1832; and cf. **Cooney v. Mountain States Telephone and Telegraph Co.**, 294 U. S. 384, 79 L. Ed. 934.

Liquid motor fuels used by the railroads in diesel and other internal combustion engines are subject to tax under this Act.

3. There is no reason why motor fuels used in internal combustion engines for tractors and "other like machinery" should not be subject to tax under the provisions of this Act.

4. Your fourth question deals with the limitation of actions against offenders of this Act. There is no limitation spelled out in the Act. There are, however, two reasons which dictate the conclusion that a 5-year limitation period is proper.

Firstly, the provisions of Title 7, Section 22, Code of Alabama 1940 would seem to apply:

"Except as otherwise specifically provided for, all actions by the State or any subdivision thereof, for the recovery of amounts claimed for licenses, franchise taxes, or other taxes." (Emphasis supplied)

There is nothing to indicate that this statutory provision does not apply to actions by the county for recovery of taxes due the county under this Act. The case of *Bradford v. Huntsville*, 215 Ala. 591, 112 So. 200, is to be distinguished from the instant situation. In the *Bradford* case the court held that no time limitation barred the enforcement of a lien against an abutting property owner for local improvements. The court also held that the 5-year statute of limitations, Section 22, *supra*, was not applicable. But the court really was holding that such an assessment for local improvement was not within the meaning of "other taxes" as used by the statute. Clearly, no such reasoning is proper in the case now under consideration.

Secondly, it would appear from Section VIII, page 160, of the Act that the Legislature intended the limitation period set forth in Title 7, Section 22, *supra*, to apply. This conclusion is readily inferable from the language "the governing body of said County shall issue execution for the collection of the same, directed to any sheriff of the State of Alabama, who shall proceed to collect the same in the manner now provided by law for the collection of delinquent taxes by the County Tax Collector" Since the limitation period in Title 7, Section 22, *supra*, is applicable to County Tax Collectors, I believe that it is also applicable to collections under this Act.

Therefore, the County may collect against offenders for 5 years from the time of delinquency.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 12, 1949.

Hon. E. C. Hudson,
Chairman of Commissioners Court,
Blount County,
Oneonta, Alabama.

Taxation—Exemptions.

Industrial plant or factory not entitled to exemption from county taxation under Title 51, Section 3, Code of Alabama 1940, as to any property in existence prior to the date of application for such exemption under the provisions of Title 51, Section 4, Code of Alabama 1940.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of May 9, 1949, is as follows:

"Blue Bell Inc. a Corporation organized under the laws of North Carolina has today presented to the Commissioner's Court of Blount County a petition for the exemptions authorized to Corporations under Title 51, Section 3, Code of Alabama of 1940, a copy of which is herewith attached.

"In view of the fact that the building has already been constructed, we entertain some doubt as to whether or not we may grant the exemption. We will appreciate your early reply on the question as to whether or not we may exempt Blue Bell Inc. from taxes under Section 3, Title 51 of the Code of Alabama for 1940.

"In the event we do have such authority to grant the exemption effective October 1, 1949, for how many years may we grant the exemption.

"We would greatly appreciate your usual promptness in rendering this opinion to our Court."

Blue Bell, Inc. is not entitled to the exemption prayed for in its petition, which you have attached to your request. The facts of this case indicate that Blue Bell completed its building, and began operation in that building during the month of October, 1948. Blue Bell did not apply for an exemption under Title 51, Section 3, Code of Alabama 1940, until May 9, 1949. The bona fides of Blue Bell is irrelevant, for it is clear that it is necessary to make an application in writing to the Court of County Commissioners or a court or board of like jurisdiction in the county in which such factory or plant is proposed to be located in order to obtain benefits of Section 3, *supra*. The exemption is not self-executing, and must be applied for under the provisions of the clear wording of Section 4, *supra*. See also: Quarterly Report of Attorney General, Vol. 24, pp. 93, 95. It is also well established that exemptions in tax statutes are construed strictly against the taxpayer, and in favor of the taxing authority. See: *Touart v. American Cyanamid Co.*, 250 Ala. 551, 35 So. 2d 484.

This office has previously construed Section 3, and Section 4, *supra*, in connection with the very problem now confronting you. These opinions leave no doubt that a plant or factory already built, without prior application for the exemption in question, is not thereafter entitled to such exemption. Quarterly Report of Attorney General, Vol. 24, page 95. See also: Quarterly Report of Attorney General, Vol. 28, page 119. Cf. Quarterly Report of Attorney General, Vol. 43, page 51 (where exemptions under Title 51, Sections 6, et seq., Code of Alabama 1940, were in issue).

The opinion in Vol. 24, *supra*, states at page 96:

"This conclusion is also fortified, in my opinion, by the recital in the statute itself that it was enacted for the purpose of encouraging the building, extension and operation of factories and plants for

the numerous manufacturing purposes enumerated therein and also by the requirement that in order to obtain the exemption the application must be made to the county, city or town, as the case may be 'in which it is proposed to locate,' the plant or factory to be exempted.

"The inference is clear, therefore, that as to all property in existence and subject to taxation at and prior to application for exemption such exemption is not authorized, or (sic) should be denied."

To reiterate, the facts of your case indicate that Blue Bell's plant was constructed and in operation prior to the date of the application for exemption. Therefore, Blue Bell's petition for exemption under Title 51, Section 3, supra, should be denied.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

July 12, 1949.

Hon. Ward W. McFarland,
State Highway Director,
CAPITOL.

Highways and Highway Department—Property.

Highway Department may assess reasonable charges for the recovery, handling and storage of property lost or abandoned on public highways or within right-of-way limits thereof and for removal, after notice, of obstructions placed thereon in violation of Title 36, Section 4, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of April 6, 1949, is as follows:

"Under the provisions of Title 36, Section 4(c), Alabama Code of 1940, this Department is charged with the duties of removing any obstruction found upon the roadway likely to endanger life, limb, or property and of removing any obstruction in the ditches and drains of any public highways.

"The above section of the Code does not provide to where such obstructions shall be removed. As a matter of practice this Department removes all objects of value such as lumber, etc. which are found

on the roadway to the camp of the District Office in the particular locality where they are held pending claim therefor by the owner. Of course, this Department could remove such objects from the paved portion of the road and place them further over on the right-of-way and leave them there. However, it is felt that this procedure is inconsistent with our duty of maintaining the right-of-way and should not be followed since a subsequent disposition must be made of unclaimed objects.

"The removal, handling and storage of materials and objects left on the state roadways of necessity involve time, labor and use of Highway equipment. If you approve of this procedure, it is requested that your office advise this Department as to whether we may legally assess reasonable charges for removal, storage, etc. against owners who wish to claim property which has been abandoned on the roadway and removed by this Department. In addition it is also requested that this Department be advised as to what subsequent disposition we may legally make of unclaimed objects which are stored by this Department on Highway premises.

"The portion of our right-of-way which is unused for pavement or shoulders is often used by private parties as a storage place for building materials and other objects. This use of necessity interferes with our maintenance and use of the right-of-way and as a matter of policy this Department attempts to forbid all such uses. It is requested that you advise us if we may legally move objects stored on our right-of-way, after due notice to proper parties where the owner is known, to our own camp sites and if reasonable handling and storage charges may be made in such cases as in the case mentioned in paragraph three. If our removal of materials from off the right-of-way is unauthorized, it is requested that you advise us as to what legal steps may be taken to protect our rights in this connection."

I am of the opinion that each of your questions is answered by the provisions of Title 36, Section 4, Code of Alabama 1940, and Title 47, Sections 155-160, Code of Alabama 1940.

Section 4, supra, places upon the Highway Director the affirmative duty of removing any obstruction found upon the roadway likely to endanger life, limb or property. It provides that any person placing any such obstruction upon any public highway, or within the limits of the right-of-way thereof, shall be guilty of a misdemeanor and subject to a minimum fine of twenty-five dollars or minimum imprisonment of ten days, or both.

Sections 155-160, supra, outline generally the procedure to be followed by a finder of lost property, and define his rights and liabilities. I am of the opinion that these provisions would apply with equal force to the State, as a finder of property lost or abandoned upon the public highways or within the right-of-way limits thereof.

To my knowledge your department has not promulgated or adopted any rule or regulation covering the procedure to be followed where lost or abandoned property or other obstructions are found on the public highways. Your attention, therefore, is invited to Title 23, Section 16, Code of Alabama 1940, which secures to the department the right to adopt all reasonable and necessary rules and regulations. Such rules, regulations and general orders would acquire the force and effect of laws. See *State v. Friedkin*, 244 Ala. 494, 14 So. 2d 363.

In my opinion, you may adopt appropriate rules and regulations assessing reasonable charges for the costs of removing, handling and storage of property lost or abandoned on the highways and for the removal, handling and storage, after due notice to any known owner, of obstructions placed thereon or within the right-of-way limits thereof which endanger life, limb or property. I am of the further opinion that such property and obstructions can thereafter be sold, if unclaimed, under the procedure outlined by Sections 155-160, *supra*, and Title 9, Sections 11-12, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 13, 1949.

Hon. J. A. Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Elections—Election Officials—Appointment.

The appointment of officials for the holding of an election under the provisions of the constitutional amendment proposed by Act No. 357, General Acts 1947, page 241, should be made by the appointing board established by Title 17, Section 120, Code of Alabama 1940, composed of the judge of probate, sheriff, and clerk of the circuit court of the county.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 15, 1949, is as follows:

“H. B. 136, Act 357, General Acts of Alabama for 1947, page 241, provides in part as follows:

‘The election shall be conducted in the manner in which the governing body of the county prescribes.’

"Sec. 120, Title 17, Code of Alabama 1940, establishes the Judge of Probate, Sheriff and Clerk of Circuit Court as an appointing board for any election to be held in the county.

"Can the County Board of Revenue serve as the appointing board for the election officials at an election to be held in accordance with provisions of said H. B. 136 aforesaid, or must said election officials be appointed under the provisions of Sec. 120, Title 17?

"Our election is called for July 19th and we will appreciate an early reply hereto."

The election here concerned is that provided for within the constitutional amendment proposed by Act No. 357, General Acts 1947, page 241, subsequently voted upon by the electorate of the State and proclaimed ratified and adopted by proclamation of the Governor under date of November 15, 1948. Said amendment provides that each of the counties affected thereby may vote upon the levy of a four-mill ad valorem tax, the proceeds of which are to be used for hospital purposes. Regarding the conduct of such election, the amendment simply provides that:

"* * * The election shall be conducted in the manner which the governing body of the county prescribes."

You inquire as to who shall appoint the election officials for such election.

It is my opinion that the election officials for the election to which you refer should be appointed by the appointing board established for such purpose under the provisions of Title 17, Section 120, Code of Alabama 1940, composed of the judge of probate, sheriff and clerk of the circuit court of the county.

I arrive at such conclusion for several reasons, the first being that the statutes of this State governing elections apparently draw a distinction between the appointment of the officers of such elections and the actual conduct thereof. Within Title 17 of the Code of Alabama 1940, it will be noted that Article 8 thereof makes statutory provision for the appointment of the election officials and prescribes their respective duties, while Article 9 of said Title is composed of those statutes governing the actual conduct and management of such elections. It is my opinion that the appointment of officials for any election must precede the actual holding or conduct of such election and is not a component part of the conduct thereof. In this regard, it is to be noted that the constitutional amendment here concerned merely provides that the election shall be conducted in the manner which the governing body of the county prescribes and, in my judgment, if any meaning at all may be given such proviso, it cannot be said that such provision prescribes any new or different method for the appointment of the officials of such election.

Next considering the language of Title 17, Section 120, Code of Alabama 1940, regarding the appointment of election officials, it is found that such statute provides as follows:

"The judge of probate, sheriff and clerk of the circuit court, or a majority of them, acting as an appointing board, must, not more than twenty nor less than fifteen days before the holding of any election in their county, appoint from the qualified electors of the respective voting places three inspectors and two clerks for each place of voting, and returning officer for each precinct, to act at the place of holding elections in each precinct." (Emphasis supplied.)

It is to be noted that this statute imposes a mandatory duty upon those officers composing the appointing board and likewise provides that such duties must be performed with respect to any election held within the county. I am, therefore, of the opinion that the provisions of such statute are applicable to the election here in question and that the officials for such election should be appointed by the appointing board therein provided for.

I would lastly observe that, while the provisions of Title 17, Section 120, supra, are a part of the general election laws of the State, the appointing board therein provided for, under the provisions of Title 17, Section 349, supra, are likewise charged with the appointment of officials for the conduct of primary elections. Furthermore, that Title 17, Section 221, supra, provides with regard to special elections, which I consider the present election to be, that such special elections shall be held, conducted and regulated in all respects by the provisions of the general election laws, unless otherwise expressly provided. As I have above stated, I do not consider the provisions of the constitutional amendment with which we are here concerned to expressly provide a different method for the appointment of the officials of the election. Consequently, it is my opinion that the appointment of the officials for the election is governed by the general election laws, and such appointments should be made under the provisions of Title 17, Section 120, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 18, 1949.

Hon. E. F. Yeilding,
Mayor, City of Florence,
Lauderdale County,
Florence, Alabama.

Military and Naval Affairs—Municipalities.

Temporary employees "employed hour by hour" by the City of Florence held not to be entitled to the benefits of military leave provided by Title 35, Section 12, Code of Alabama 1940.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of June 14, 1949, is as follows:

"Some of our Departments in the City of Florence have a number of temporary employees and are paid hourly wages. In other words, they are actually employed hour by hour. Some of these employees are members of the National Guard. Since these men are employed temporarily would they be entitled to the benefits of Title 35, Section 12 of the 1940 Code, entitled 'Military Leave for Government Employees'?"

"We would appreciate a prompt ruling on this question as the time limit is short before encampment of the National Guard."

Under the facts stated, it is my opinion that your question is properly answered in the negative.

Title 35, Section 12, Code of Alabama 1940, reads as follows:

"§ 12. Military leave for government employees—All officers and employees of the State of Alabama, or of any county, municipality, or other agency or political subdivision thereof, who shall be active members of the Alabama national guard or naval militia, or of the officer's reserve corps of the United States Army, or of the United States naval reserves, shall be entitled to military or naval leave of absence from their respective civil duties and occupations on all days that they shall be engaged in field or coast defense or other training or on other service ordered under the provisions of this chapter, or of the national defense act, or of the federal laws governing the United States naval reserves, without loss of pay, time, efficiency rating, annual vacation, or sick leave, but no such person granted such leave of absence with pay shall be paid for more than twenty-one working days at any one time." (Emphasis supplied.)

It is my opinion that the Legislature, in using the word "employees" noted in the first sentence of the statute quoted above, did not intend to extend the benefits provided for to temporary employees employed hour by hour.

While there has apparently been no court interpretation of the statute above quoted, nor has our State Personnel Board promulgated any official interpretive rule or regulation on such a question as you present, it is my opinion that the Legislature, in using the word "employees" noted in the first sentence of the statute, did not intend to extend the benefits provided for to temporary employees employed hour by hour.

In Fields' Civil Service Law, Chapter VII, "Leaves of Absence," p. 146, the following is noted:

"Leaves for temporary employees seem not to be favored, and statutes and regulations are generally interpreted against rather than in favor of them."

I might add that while our State Personnel Board has not promulgated an interpretive rule or regulation on such a question, as previously commented upon, I am informed by the Board's Director, Charles W. Terry, that in the practical application of the statute to State employees, the State Personnel Board has always accorded the statute the interpretation that it did not extend to temporary employees employed hour by hour.

You are, therefore, advised that it is my opinion that temporary employees employed hour by hour by the City of Florence are not entitled to the benefits of military leave provided for by Title 35, Section 12, Code of Alabama 1940, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 18, 1949.

Hon. Ed E. Reid,
Executive Director,
The Alabama League of Municipalities,
14 South Hull Street,
Montgomery, Alabama.

Municipalities—Licenses.

The business of operating terminal facilities for motor carriers is subject to municipal license tax according to the provisions of Act No. 669, General Acts 1939, page 1064, approved July 5, 1939 (Title 48, Section 301(31), 1947 Cumulative Pocket Part, Code of Alabama 1940).

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of June 18, 1949, is as follows:

"There is located in Gadsden a motor terminal which engages in interchanging interstate commerce freight. It contends that since it handles no intrastate deliveries or does not serve as a terminal for the purpose of dispatching freight intrastate that it is not liable

for a municipal license. We have always taken the position that when freight is brought from without the State to a point within the State that when the freight comes to rest at the point within the State the interstate delivery ends even though the freight be reloaded at this terminal and directed to another point outside the State. Please advise me whether or not a terminal that receives freight from without the State to be reloaded and transmitted to another point without the State is liable for a municipal license tax." My answer is in the affirmative.

Your attention is directed to Act No. 669, General Acts 1939, page 1064, approved July 5, 1939 (Title 48, Section 301(31), 1947 Cumulative Pocket Part, Code of Alabama 1940). Section 31 thereof reads as follows:

"Section Thirty-One. MUNICIPALITIES. Any incorporated city or town in this State shall have the right by proper ordinance to tax and collect reasonable privilege license or taxes from any motor bus terminal, or any person operating any terminal or station facilities for transportation of passengers, property or express, transported by motor carriers, and any motor carrier as defined by this Act where such motor carrier does business in said city or town by receiving passengers or freight for transportation for hire between said city or town and another point in Alabama, provided, however, that said privilege license or tax shall not exceed the sum of \$25.00 in incorporated cities or towns of less than 5,000 inhabitants, and that said privilege license or tax shall not exceed the sum of \$100.00 in incorporated cities or towns of over 5,000 and less than 25,000 inhabitants; and that said privilege license or tax shall not exceed the sum of \$200.00 in incorporated cities or towns of more than 25,000 and less than one hundred thousand inhabitants; and that said privilege license or tax shall not exceed the sum of \$300.00 in incorporated cities or towns of over one hundred thousand inhabitants; and that the population shall be computed on the federal census of 1930 or any subsequent decennial federal census; and provided further that said privilege license or tax shall, in cases of motor buses, include the privilege of receiving and discharging both passengers and express." (Emphasis supplied.)

The business you describe is that of a motor terminal operation which involves interchange of freight. From the wording of the statute, supra, it appears clear that the Legislature has made specific provision for the levy of a municipal license tax upon such a type business operation. The character of the shipments being interstate or intrastate, in transit or otherwise, does not, therefore, in my opinion, have any bearing on the particular question you pose. Our Alabama Supreme Court, in the case of *Acme Freight Lines v. City of Dothan*, 242 Ala. 468, 6 So. 2d 595, held, in pertinent part, as follows:

"§ 301(31) includes * * * 'any person' operating a freight station, a facility for transporting freight by motor carriers, such as truck lines.

"The privilege of operating such terminal facilities as a local place of business in the city is thus classified as a subject for license tax. The word 'person' is defined in the same act, § 301(1), to include an 'individual * * * corporation, company, association.'

"The intent seems clear enough to subject any corporation or association operating such terminal facility to the privilege tax, whether or not otherwise engaged in transportation of passengers or freight."

In view of the above, you are, therefore, advised that it is my opinion that municipal license taxes may be levied on such terminal operations described in the amounts outlined in Section 31 of Act No. 669, General Acts 1939, page 1064, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 18, 1949.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Counties—Courts of County Commissioners—Electric Fans.

1. Courts of county commissioners have authority to purchase and install electric fans for all offices in the courthouse as a part of the cooling and ventilating system of the courthouse building, and the occupancy of said offices is immaterial.

2. Said electric fans may be purchased from funds appropriated directly from the county treasury for such purpose by the court of county commissioners.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of June 9, 1949, is as follows:

"You have previously ruled that county governing bodies may purchase fans as an item of equipment for the office of County Superintendent of Education. We take it for granted that we will also be allowed to purchase fans for other strictly county offices but inasmuch as the laws governing expenditures of Commissioners' Courts and other like bodies must be construed strictly, we would like also to have your opinion as to whether or not we can buy electric

fans for such offices as the Service Commissioner, the Welfare Department, Health Department and Extension Service offices, where these offices are in our Court House.

"At the present time, other governmental agencies are furnishing equipment for these offices and not the county.

"Should they look to these agencies for electric fans?

"Should these offices, if they are allowed to have a fan, purchase the same from monies belonging to these departments appropriated to them in the yearly budget by the county?

"Now, if the county is allowed to appropriate money to them for this purpose, may we expend it directly from the County Treasury or should it be included in our yearly appropriation to them when we make our annual budget?"

It is my opinion that courts of county commissioners have authority to purchase electric fans for all offices in the courthouse building.

In Biennial Report of Attorney General, 1928-30, page 981, Biennial Report of Attorney General, 1930-32, page 983, and Quarterly Report of Attorney General, Vol. 16, page 177, this office held that purchase of electric fans was unauthorized. However, in Quarterly Report of Attorney General, Vol. 20, page 64, it was held that the county governing body may purchase and install heating, cooling, and ventilating systems for county courthouses provided such units are permanently affixed to and become a part of the building. This conclusion was based on the authority given county governing bodies in Sections 210 and 212, Code of Alabama, 1923, which appear as Title 12, Sections 178 and 185, respectively, of the Code of Alabama 1940.

In Quarterly Report of Attorney General, Vol. 49, page 61, this office modified the holding of the opinion reported in Quarterly Report of Attorney General, Vol. 20, page 64, *supra*, to the extent that heating, cooling, and ventilating systems need not necessarily be affixed to and become a part of the building, and held that all offices of the courthouse may be equipped with electric fans, expressly overruling all opinions to the contrary.

In your letter of request for an official opinion, you state that all the offices for which purchase of fans is in question are offices located in the courthouse. In view of the holding of this office in the opinion noted immediately above, it is my opinion that electric fans may be purchased for all offices located in the courthouse as a part of the courthouse building's cooling and ventilating system, regardless of the occupancy thereof. These fans may be purchased from funds appropriated by the court of county commissioners directly from the county treasury under the authority of Title 12, Sections 178 and 185, Code of Alabama 1940, *supra*. Section 178, in particular, reads as follows:

"§ 178. County buildings erected and repaired by county.—The county buildings are to be erected and kept in order and repair at the expense of the county, under the direction of the court of county commissioners, which court is authorized to make all necessary contracts for that purpose."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 20, 1949.

Hon. J. A. Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Elections—Election Officials—Appointment.

The statutory provision of Title 17, Section 120, Code of Alabama 1940, that officers of election be appointed by the appointing board therein constituted not more than twenty nor less than fifteen days prior to the holding of an election, is considered to be formal and directory only, and the fact that such officers were appointed at a subsequent date will not serve to vitiate or invalidate such election, in the absence of fraud in the conduct thereof.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your telegraphic request, dated July 15, 1949, is as follows:

"Appointing Board mentioned in Title 17, Section 120, was uncertain as to legality of appointing election officials in Houston County until they received word from your office. On July 2, the Houston County Board of Revenue appointed the officials of election. The advice did not arrive from your office until July 15. Election is called for July 19th and the appointing board unanimously approved the appointments as of today. Is this a legal appointment and will it create a valid election?"

The opinion of this office to which you refer in your telegraphic request is that rendered you under date of July 13, 1949, in which I held that the appointment of officials for the holding of an election under the provisions of the constitutional amendment proposed by Act No. 357, General Acts 1947, page 241, should be made by the appointing board established by Title 17, Section 120, Code of Alabama 1940, composed of the judge of probate, sheriff, and clerk of the circuit court of the

county. It appears from your request that prior to the receipt of such opinion, on July 2, 1949 the county governing body of Houston County appointed the officials for the election to be held upon July 19. Further, that upon the receipt of said opinion upon July 15, 1949, holding as above stated, the appointing board thereupon, in compliance with said instructions, appointed the same officials to act in the holding of such election. You inquire as to whether this appointment at this subsequent date will serve to vitiate or invalidate the election to be held upon July 19, 1949.

In my opinion, it does not.

The provisions of Title 17, Section 120, Code of Alabama 1940, are as follows:

"The judge of probate, sheriff and clerk of the circuit court, or a majority of them, acting as an appointing board, must, not more than twenty nor less than fifteen days before the holding of any election in their county, appoint from the qualified electors of the respective voting places three inspectors and two clerks for each place of voting, and returning officer for each precinct, to act at the place of holding elections in each precinct."

It is true that the above statute provides that the appointing board therein constituted must, not more than twenty nor less than fifteen days before the holding of any election in their county, appoint from the qualified electors of the respective voting places, the officers of such election. However, it has been held by the Supreme Court of this State that those provisions of the election law which are not essential to a fair election will be construed by the courts to be formal and directory merely, unless the statute itself declares them to be essential. *Montgomery v. Henry*, 144 Ala. 629, 39 So. 507. It is to be noted that the above-quoted statute does not declare that compliance therewith is essential to the validity of any election.

In the case of *Lee v. State*, ex rel Locke, 49 Ala. 43, the Supreme Court of Alabama had occasion to consider the question of the validity of ballots cast in an election in which certain irregularities concerning the conduct thereof arose. In its opinion, the Supreme Court made reference to a case decided by the courts of the State of New York considering a like question, and there observed that in deciding said questions the court declares that statutes directing the mode of proceeding by public officers are directory, and are not to be regarded as essential to the validity of the proceedings themselves, unless it be so declared in the statute. After setting forth in detail the alleged irregularities arising, the court made the following statement:

"The principle settled in that case is, that if it does not appear that any illegal votes were received, or any legal votes rejected at the election, and there is no evidence of fraud in conducting the polls, or canvassing the votes, such and like irregularities will

not render the election void. That case, it seems to us, presents the view that ought to be taken in disposing of the present case and all cases of this sort. It establishes the principle, and we think correctly, that an election ought not to be held invalid on account of irregularities, where no illegal votes are alleged to have been received, and no legal votes to have been rejected, and where no misconduct is shown, calculated to prevent a fair, free, and full exercise of the elective franchise."

In the case of *Montgomery v. Henry*, supra, the Supreme Court of Alabama observed as follows:

"The courts in order to give effect to the will of the majority, and to prevent the disfranchisement of legal voters have uniformly held those provisions to be formal and directory merely, which are not essential to a fair election, unless such provisions are declared to be essential by the statute itself. In *McCary* on elections, § 190, the rule is stated as follows: 'If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statutes must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and considerations touching its policy or impolicy must be addressed to the legislature. But if as in most cases, the statute simply provides that certain acts or things shall be done within a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election.'—§ 225 and citations in note 2." (Emphasis supplied.)

In its opinion in the *Montgomery* case, supra, the Court took note of the fact that text writers on this subject have expressed the view that in general those statutory provisions which fix the day and the place of the election and the qualifications of the voters are substantial and mandatory, while those which relate to the mode of the procedure in the election, and to the record and the return of the results, are formal and directory only. The Court in this opinion again reaffirmed the principles announced in the *Lee* case, supra, that:

"* * * The rules prescribed by the law for conducting an election are designated chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain with certainty the result. Generally such rules are directory, not mandatory, and a departure from the mode prescribed will not vitiate an election if the irregularities do not deprive any legal voter of his vote, or admit an illegal vote, or cast uncertainty on the result, and have not been occasioned by the agency of a party seeking to derive a benefit from them.' Judge Post, speaking for the supreme court of Nebraska in the case of *Waggoner v. Russell*, 15 L.R.A. 740, 51 N. W. Rep. 465, said: 'The view expressed

by these authors has the support of the great majority of cases in this country and England. In fact, we are not aware that there is to be found in the reports any diversity of opinion on the subject. * * *."

Numerous authorities are cited by the Court in support thereof.

Even more appropos do I consider the opinion of the Supreme Court rendered in the case of *Mizell v. State ex rel. Gresham*, 173 Ala. 434, 55 So. 884. Although the facts are not stated in detail in such opinion, it appears that in this, a municipal election, the place and officers for the conduct of said election were first designated by the mayor of the municipality concerned, whereas authority for the designation of same was vested by law in the town council. It further appears that at a subsequent date, but not within the time prescribed by law, said place and officers of election were properly designated by the town council. This, to me, appears to be an analagous situation to that here presented. In writing to the particular point here involved, Chief Justice Anderson, speaking for the Court, stated as follows:

"Nor can it be said that the council did not have the authority to change the inspectors and clerks before the day of the election. Of course the law contemplates that they be selected 10 days in advance of the election, but doing so at a subsequent day would not render the election void. If some of them should die or leave before the election, or if the council should discover that they were unfit, they would have authority to appoint others, and this authority is not taken from them, merely because section 1164 makes provision for what shall be done if the inspectors, or any one of them, do not appear on election day. This merely provides for a contingency in the event those selected by the council do not appear, but does not mean the council exhausted their authority in the first instance.

"Moreover the law contemplates that the election should be held by qualified electors, and if so held, and fairly so, it matters but little who they were, and the fact that one person or another served as an inspector or clerk does not render the election void. Therefore the polling place was fixed at Grimes' store by those who had authority to do so, and at the council chamber by one who had no authority to do so and, whether the inspectors were or were not selected under the letter of the law, they were eligible to hold same and they held it under the authority of those having the power to appoint, and we cannot say that the election held in Grimes' store was void, and was not such an election as could be contested."

The section, 1164, mentioned within the above-quoted portion of the opinion of the Court, is now found within Title 37, Section 26, Code of Alabama 1940, and is like in its effect to municipal elections as is Title 17, Section 132, Code of Alabama 1940, to the election here con-

cerned. It is, therefore, my opinion that irrespective of the provisions of Section 132, supra, it is proper that the officers of election be appointed by the duly authorized body prior to the date and holding the election, even though it not be within the statutory time prescribed by Title 17, Section 120, supra.

In conclusion, I would state it to be my opinion that the statutory provision that officers of election be appointed not more than twenty nor less than fifteen days prior to the holding of an election is considered to be formal and directory only, and the fact that such officers were appointed at a subsequent date will not serve to vitiate or invalidate such election, in the absence of fraud in the conduct thereof.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 20, 1949.

Hon. C. C. Horton, Director,
Department of Veterans Affairs,
CAPITOL.

Veterans—U. S. C. A. and Farms.

Veteran with a degree in agriculture is entitled to the privileges of institutional on-farm training.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of June 24, 1949, is as follows:

"Under the several and various federal laws relating to the education and training of veterans commonly referred to as the 'G. I. Bill of Rights as Amended,' is a provision giving authority to the governor of a state to designate a State Approval Agency, which will have the authority to approve courses of instruction for the training of eligible veterans having entitlement to such education and training.

"Under Public Law 377 of the 80th Congress is set up a type of education and training known as 'Institutional on-farm training.' Public Law 377 has the effect of amending certain paragraphs of Part VIII of Veterans' Regulation Numbered I(a), as amended, and sets forth, among other things, in part as follows:

"(c) As used in this part, the term 'institutional on-farm training' shall include any course of instruction approved by the appropriate agency of the state or the Administrator."

"Will you be good enough to render an official opinion as to whether or not under the applicable provisions of this and other related federal laws, the 'State Approval Agency' may arbitrarily impose additional limitations of entitlement? Specifically, I would like to know whether or not a veteran, otherwise entitled, may be denied the privileges of institutional on-farm training simply because he holds a degree in agriculture from the Alabama Polytechnic Institute or a similar institution.

"Your examination of this question and your official opinion will be appreciated by the undersigned and by the several hundred veterans in Alabama who are adversely affected by the existing policies of the State Approval Agency in respect to this specific question."

The answer to your question involves consideration of the applicable Federal statutes. Title 38, Section 701, U. S. C. A., as amended June 19, 1948, reads, in pertinent part, as follows:

"(f) Any person who served in the active military or naval forces on or after September 16, 1940, and prior to the termination of hostilities in the present war, shall be entitled to vocational rehabilitation subject to the provisions and limitations of Veterans Regulation Numbered 1(a), as amended, part VII, or to education or training subject to the provisions and limitations of part VIII."

From the foregoing, and after consideration of Veterans' Regulation No. 1(a), as amended, it is clear to me that any person who served honorably in the armed forces within the inclusive dates is entitled to the benefits of the act regardless of his previous educational attainments. These benefits apply to both the Ph.D. and the illiterate. Therefore, it is my opinion that the holder of a degree in agriculture would be entitled to the privilege of institutional on-farm training.

However, it should be pointed out that by the provisions of Veterans Regulation No. 1(a) (c), the approval of the instructions offered the veterans must be made by the appropriate agency of the State or the administrator. To be approved, such a course shall be developed with due consideration to the size and character of the farm on which the veteran is to receive his supervised work experience and to the need of the veteran, in the type of farming for which he is training, for proficiency in planning, producing, marketing, farm mechanics, conservation of resources, food conservation, farm financing, farm management, and the keeping of farm and home accounts.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

July 20, 1949.

Hon. Clifton C. Cobb,
Executive Secretary,
Board of Registration for Professional Engineers
and Land Surveyors,
702 Washington Avenue,

Montgomery, Alabama.

Engineers and Land Surveyors—Budget Act.

The Board of Registration for Professional Engineers and Land Surveyors is required to operate under the budget as prepared by the Division of the Budget in the Department of Finance.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of May 17, 1949, is as follows:

"Section 131, Title 46, Chapter 7, 1940 Code of Alabama, provides for the creation of a State Board of Registration for Professional Engineers and Land Surveyors, and provides for the appointment of Board members and specifying their term of office.

"Section 136 of the same Title defines powers of the Board.

"Section 137 of the same Title provides for the receipts and disbursements.

"Section 138 of the same Title provides the manner in which records and reports are to be prepared.

"I have been directed by this Board to request an opinion to determine if this Board shall be required to operate under a budget as prepared by the Division of the Budget in the Department of Finance.

"Thanking you in advance for your consideration."

My answer is in the affirmative.

Title 55, Section 102, Code of Alabama 1940, relating to the Division of the Budget in the Department of Finance, reads as follows:

"§102. Allotments.—Before an appropriation for any purpose to any department, board, bureau, commission, agency, office or institution of the state shall become available, there shall be submitted

to the department of finance not less than twenty days before the expiration of the last period for which an allotment has been or shall have been made, a requisition for an allotment of the amount estimated to be necessary to carry on its work during the period for which allotments are made. Allotments shall be made for such length of time as may be determined to be appropriate and convenient by the department of finance, with the approval of the governor, but no allotment (except for the acquisition of land, permanent improvements or other capital projects) shall, in any event, be for a period of longer than three months. Such requisition for an allotment shall contain such information and data and be in such detail as may be required by the department of finance. The department of finance shall examine such requisition and, with the approval of the governor, shall make such allotment, or modification thereof, as may be deemed necessary, but the total amount of annual appropriations to any department, board, bureau, commission, agency, office or institution of the state shall not be reduced except proportionately as provided for in the preceding section. The department of finance shall submit copies of each allotment thus approved to the head of the department, board, bureau, commission, agency, office, or institution of the state for which such allotment shall have been made. The comptroller in the department of finance shall set up such allotment on his books and be governed accordingly in his control of expenditures. Allotments of appropriations made for the acquisition of land, permanent improvements, and other capital projects may, however, be allotted in one amount by major classes or projects for which they are expendable without regard to allotment periods. Any allotments may be subsequently modified by the department of finance, with the approval of the governor, either upon the written request of the head of the department, board, bureau, commission, agency, office or institution of the state concerned or upon the initiative of the department of finance or the governor; and notice of such modification shall be given and such modification shall be set upon the books of said comptroller in the same way as in the case of original allotments." (Emphasis supplied.)

The first underscoring noted above places the discretion of budgetary allotment in the hands of the Department of Finance, with the approval of the Governor. As noted, the total amount of annual appropriations, however, shall not be reduced except on a pro rata basis to prevent overdraft in accordance with Section 101. Section 101, in effect, calls for all departments, boards, etc., to undergo pro rata reductions without discrimination when the financial situation of the State demands such action.

The second underscoring noted above provides for a modification of allotments already scheduled, either at the request of the head of the board or upon the initiative of the Department of Finance or the Governor. In all instances the allotments subsequently provided in modification must be decided upon by the Department of Finance with the approval of the Governor.

Expenditures of the Board are thus controlled by the budget allotments heretofore noted.

Title 46, Seciton 137, Code of Alabama 1940, to which you refer, has been amended by Act No. 543, General Acts 1943, page 525. This statute, while relating to receipts and disbursements, does not in any way withdraw the applicability of the Budget Act provisions, supra, and, in my opinion, should be acted upon in harmony therewith.

Your attention is also directed to Title 55, Section 106, Code of Alabama 1940, which makes it unlawful to expend money other than as budgeted and allotted, and authorizes the Governor to suspend further appropriations and allotments until amounts diverted have been replaced. Your attention is further directed to Title 55, Section 107, Code of Alabama 1940, which provides for penalties and punishment of individuals willfully and knowingly violating the provisions of the Budget Act.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 16, 1949.

Hon. G. E. Weaver, Superintendent,
Board of Education,
Blount County,
Oneonta, Alabama.

County Boards of Education—Schools.

1. A child must attend the school properly designated by the county board of education pursuant to its rules and regulations and inconformity with established attendance districts, and if not attending that school the child may be transferred to the designated school, no responsibility resting upon the said board to furnish transportation to any other school.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of August 2, 1949, is as follows:

"I would like to have a ruling on the following questions if possible.

"We have children living near some of our County schools who prefer going to the larger schools where their older brothers and sisters attend high school and where their parents think that they may obtain better advantages. Can the County Board of Education

force these children below certain grades to attend the school nearest their homes?

"If the transportation facilities to the larger school should become over-crowded, can the parents of the children demand additional facilities to permit their children to attend the larger school?

"If the children have already attended the larger school, can the Board of Education by a resolution force the transfer of these children back to a school nearer their homes?"

I am of the opinion that your first question must be answered in the affirmative.

By Title 52, Sections 73-74, Code of Alabama 1940, there is vested in the county board of education general supervisory powers over the public school system of the county and power to determine the educational policy of the county, with the duty of prescribing rules and regulations for the conduct and management of the schools.

The right to attend public school and receive instruction therein is not a private right, but is a political privilege held in common with all others of the same community. Implied in the powers granted to the county board of education by Sections 73-74, supra, is the authority to assign pupils to the several schools within its jurisdiction and to designate the school which particular pupils shall attend. See 56 *Corpus Juris, Schools and School Districts*, Sections 980-990. Such assignments should, of course, be made uniformly in accordance with reasonable rules and regulations, and not upon an arbitrary or discriminatory basis. Title 52, Sections 95 and 314, Code of Alabama 1940, impose upon the county board of education the mandatory duty of arranging the county, exclusive of cities, into one or more "appropriate and convenient" compulsory school attendance districts. Quarterly Report of Attorney General, Vol. 24, page 115. See, also, Title 52, Section 113, Code of Alabama 1940.

Your second question is answered in the negative. Having reached above the conclusion that a child must attend the school designated by the county board of education, pursuant to and in conformity with its rules and regulations, the question of the board's responsibility for furnishing transportation to any other school need not be further considered. County school funds must be used for county school purposes within the law. Biennial Report of Attorney General, 1928-1930, page 40.

Your third question is answered in the affirmative. In my opinion the fact that a child has been enrolled in a school does not assure to the child or its parents any vested right that the child be allowed to continue its education in that particular school, provided the child is not attending the school designated by the county board of education. The equivalent of this conclusion is that the board has power to enforce its rules and regulations and to correct any inequities or mistakes in their application. If not attending the school to which assigned, the child may

be transferred to the proper school, which must be determined by the county board of education, subject always to those justifiable and non-discriminatory exceptions which the board may make in the exercise of a wise discretion. To allow place of attendance to be determined by the choice, whim, or caprice of the child would throw the education system into chaos. While parents may not agree that their child is receiving in the school assigned educational advantages comparable to those offered by another school in the county, the answer is that the county is, in theory at least, furnishing the best possible facilities in each attendance district and improvements must come by complaints to and action by the governing board of education. It is the child's responsibility to attend school; it is the board's responsibility to designate where the child shall attend school, and to see that it does attend. Quarterly Report of Attorney General, Vol. 53, page 34.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

Augst 18, 1949.

Honorable J. H. Dobbins,
Clerk of the Circuit Court,
Calhoun County,
Anniston, Alabama.

Grand Juries — Preliminary Hearings — Clerks of Circuit Courts.

Clerks of circuit courts not prohibited from disclosing or divulging proceedings or results of preliminary hearings in cases bound over to grand jury. Title 30, Section 95, Code of Alabama 1940, applies only to the results of grand jury proceedings and not to any preliminary proceedings prior thereto.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of Augsut 12, 1949, is as follows:

"When a case is bound over to the Grand Jury and filed in the Clerk's office, whether from Recorder's Court or from County Court, please give me your opinion as to whether the Clerk can legally divulge the name of the defendant in such case to any person, even the Sheriff, Sheriff's Deputies or City Officer, before the case is brought before the Grand Jury.

"Title 30, Section 95,—Disclosure of Indictment by Officer or Grand Juror, reads as follows:

"Any Judge, Solicitor, or Clerk, or other officer of the court, or grand juror, who discloses the fact that an indictment has been found, before the defendant has been arrested, or has given bail for his appearance to answer thereto, must, on conviction, be fined not less than two hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months.'

"Would this law not also apply to the disclosing of the name of a person bound over to await action of the Grand Jury before the meeting of such Grand Jury.

"When I issue the subpoenas to witnesses to appear before the Grand Jury, containing the number of the Grand Jury case, the officers request that I give them the names of the defendants in order that they may prepare the evidence to present to the Grand Jury. Also attorneys make request to see the file before indictment. I find no authority to refuse these requests before the Grand Jury meets."

I am of the opinion that your first unnumbered inquiry should be answered in the affirmative.

There is no provision in our law that I am able to find that would prevent the clerk from disclosing or divulging the proceedings and results of a preliminary hearing. Such a hearing is in nowise secret or confidential, regardless of whether the accused is bound over to the grand jury or released.

Your second unnumbered inquiry, in my opinion, should be answered in the negative.

Title 30, Section 95, Code of Alabama 1940, quoted in your letter of inquiry, applies only to the results of grand jury proceedings and not to any preliminary proceedings prior thereto. It is a penal statute and must be strictly construed. In my judgment, it cannot be extended to apply to the disclosing of the name of a person bound over to await the action of the grand jury.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 18, 1949.

Hon. Roy E. Blair,
Tax Assessor,
Madison County,
Huntsville, Alabama.

Ad valorem Taxes—Assessments.

1. Ad valorem taxes are collectible against the owner of leased property, and not against the lessee of such property.

2. Raw materials are exempt from ad valorem taxation if produced during the current calendar year and if stocked at a plant or furnace for manufacturing purposes in Alabama.

3. Manufactured articles on hand are exempt from ad valorem taxation only if produced within the previous twelve months, and only if stored at or near the place of manufacture or within the county where the articles were manufactured or produced.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of April 22, 1949, is as follows:

"I am writing you in connection with the assessment, if any, to be made by the Solvay Process Division of Allied Chemical & Dye Corporation, a Foreign Corporation with a Branch in the Huntsville Arsenal, Huntsville, Alabama.

"The Solvay Process Division leases from the U. S. Government the building, plant, equipment and machinery with which they produce their product. The product which is produced is chlorine and alkalis. The Solvay Process Division owns no portion of the equipment used in manufacturing their product, even the replacement of equipment is bought for the Government and title to the equipment reverts to the Government upon the expiration of the lease by the U. S. Government to the Solvay Process Division.

"However, Solvay Process Division owns office equipment; such as, typewriters, adding machines, calculating machines and etc. They also have on hand some stock of goods consisting primarily of ordinary salt, the raw material out of which their chemicals are made. Solvay Process Division makes no attempt to stock their manufactured articles but often have on hand the finished product awaiting shipment. This finished product is stored in tank cars awaiting pickup by the railroads.

"My question is: What, if any, property is subject to assessment for ad valorem taxation by Solvay Process Division?

"I would appreciate very much if you would give us an answer as soon as possible so that I may pass the word on to them."

Your request as to the taxability to the Solvay Process Division (hereinafter referred to as "Solvay") involves different types of property.

1. It would appear from your request that the building, plant, equipment and machinery now used by Solvay are owned by the United States Government, and are merely leased by Solvay. The ad valorem tax is imposed on the owner, who is the lessor in this case. No ad valorem tax is, therefore, collectible against Solvay for property which it does not own. See: *Ken Realty Co. v. State*, 247 Ala. 610, 25 So. 2d 675. Of course, property owned by the United States Government is not taxable. Title 51, Section 2(a), Code of Alabama 1940.

As to the replacements, it is not quite clear from your request whether title to these replacements is, at any time, in Solvay. It is probable that title to these replacements is at all times in the United States Government. If this is so, then the analysis in the above paragraph would apply, and these replacements would not be taxable to Solvay, since Solvay is not the owner of them. Of course, if Solvay were the owner of the replacements, then the replacements would be taxable to Solvay under the ad valorem tax.

2. There is no question that the typewriters, adding machines, calculating machines, and other office equipment, owned by Solvay, are subject to assessment for the ad valorem tax. See: Title 51, Section 21 (e), Code of Alabama 1940.

3. Your request is again not clear as to the exact status of the stock of goods which Solvay has on hand. You say that they consist primarily of raw material from which Solvay makes chemicals. It is also unclear whether or not these raw materials, or what portion of these raw materials, were produced during the current calendar year. Raw materials are exempt from ad valorem taxation under Title 51, Section 2 (1), Code of Alabama 1940, which provides:

"All raw material, including coke, produced during the current calendar year, when stocked at any plant or furnace for manufacturing purposes in Alabama."

Therefore, an exemption would extend to that stock of goods on hand which consists of raw materials, provided these raw materials were produced during the current calendar year. Even if these goods are raw materials, if they were not produced during the current calendar year, they do not fall within the exemptions to the ad valorem tax. It is necessary to answer your question hypothetically because your request does not contain sufficient information on this point.

4. Your request as to the stock of manufactured articles on hand is again lacking in essential information. Manufactured articles are exempt under the provisions of Title 51, Section 2(m), Code of Alabama 1940, for 12 months after production or manufacture.

Your request does not inform me as to the length of time during which these manufactured articles have been stored. (I assume that they have been stored at or near the place of manufacture or within the county where the articles were manufactured or produced—another prerequisite for the exemption under Title 51, Section 2(m), *supra*.) It is clear, therefore, that unless these finished products have been produced within the last 12 months they are not exempt from assessment for ad valorem tax purposes.

The fact that the goods are awaiting shipment, even admitting, *arguendo*, that the goods are to be shipped in interstate commerce, is a colorless fact. A state may subject all property within that state to an ad valorem tax, regardless of the proximity of that property to interstate commerce. See: *Memphis Natural Gas Company v. Stone*, 335 U. S. 80, 68 S. Ct. 1475, 92 L. Ed. 1409. See also: *Northwest Airlines v. Minn.*, 322 U. S. 292, 64 S. Ct. 950, 88 L. Ed. 1283; *Western Union Telegraph Company v. Attorney General*, 125 U. S. 530, 8 S. Ct. 961, 31 L. Ed. 790; *Postal Telegraph Company v. Adams*, 155 U. S. 688, 39 L. Ed. 311.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1949.

Hon. J. H. Allen,
Tax Collector,
Lamar County,
Vernon, Alabama.
Counties—Taxation.

Title 51, Sections 71 and 884, Code of Alabama 1940.

The special county tax authorized by that constitutional amendment proposed by Act No. 357, General Acts 1947, page 241, and thereafter proclaimed ratified and adopted as a part of the Constitution of Alabama, upon being authorized by vote of the electors of the county and levy having been made by the county governing body according to law upon the second Monday in February 1949, should be collected for the tax year ending September 30, 1949.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of March 10, 1949, is as follows:

"On January 25, 1949 an election was held in Lamar County to determine whether or not a 4 mill advalorem tax should be levied on all taxable property to build and equip a hospital in the county. The election carried and the results were certified according to law. On the second Monday in February the Court of County Commissioners levied the county taxes, including the 4 mill county hospital tax that was voted on the above date.

"Am I, as Tax Collector of this county, authorized to collect this tax this fall on 1949 taxes? The tax year for 1949 began on October 1, 1948 and the tax was voted on January 25, 1949. However, the Tax Assessor's books were not closed until the 4th Monday in February 1949 if I understand the law."

The levy to which you refer is made under the authority of that constitutional amendment proposed by Act No. 357, General Acts 1947, page 241, voted upon by the electorate of the State at the general election of 1948 and thereafter proclaimed ratified and adopted by proclamation of the Governor upon November 15, 1948. Said constitutional amendment is to the effect that such levy having been authorized by vote of the electors of the individual county, it is mandatory that the governing body of such county levy and collect the tax therein provided for. In your request, you advise that such election has been held, receiving the affirmative vote of the electors of the county, and that such levy has now been imposed by the county governing body, by action taken upon the second Monday in February, in accordance with the provisions of Title 51, Section 71, Code of Alabama 1940. You inquire as to whether you should collect such tax for the tax year 1949.

In my opinion, you should.

The provisions of Title 51, Section 71, Code of Alabama 1940, relative to the levying of special county taxes, are as follows:

"The court of county commissioners or other court of like jurisdiction, at the regular February term in each year, shall levy the amount of general taxes required for the expenses of the county for the current year, not to exceed one-half of one percent of the value of the taxable property as assessed for revenue for the state as shown by the book of assessments after it shall have been corrected, and at the same time levying the amount of special taxes required for the county for the current year, which levy shall be made upon

the same basis of valuation provided above and when such levy shall be made, to certify the rate or rates of taxation, and the purpose or purposes for which the tax is levied to the tax assessor of the county." (Emphasis supplied.)

From your request, I understand that such procedure was followed in the instant case with respect to the tax here in question.

Under our statutes, the process of assessment for the tax year 1949 began upon October 1, 1948. As of that day, owners are to make their returns, values are to be fixed and the taxes laid. Likewise, by virtue of Title 51, Section 884, Code of Alabama 1940, there is created an inchoate lien upon the property as of the tax day, a lien which is to be effective for the amount of the taxes for the ensuing year as fixed by the defined statutory method. Such "statutory scheme" has been upheld by the Supreme Court of the United States in the case of *U. S. v. State of Alabama*, 313 U. S. 274, 61 S. Ct. 1011, 85 L. Ed. 1327; Quarterly Report of Attorney General, Vol. 31, page 5.

It is, therefore, my judgment with reference to the question here concerned that, although the process of assessment began as of October 1, 1948, such does not act to prevent the county governing body from levying, the tax assessor and the County Board of Equalization from assessing, or yourself from collecting, the taxes arising by virtue of the four-mill levy made under the authority of the constitutional amendment hereinabove mentioned for the tax year 1949, and that you should collect such tax along with other taxes due for the tax year 1949, the assessment for said taxes being based upon the value of the taxable property as assessed for revenue for the State, and to be certified to you by the tax assessor along with the other taxes.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1949.

Hon. J. L. Killian, Sr.,
Judge of Probate,
Lee County,
Opelika, Alabama.

Board of Registrars — Notice of Registration — Payment of Expense.

The cost incurred in making and giving the notice required of the board of registrars under the provisions of Act No. 266, General Acts 1949, approved July 22, 1949, is to be paid by the State, the bills therefor to be rendered to the Director of Finance and approved by him as provided for by Title 17, Section 37, Code of Alabama 1940.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of August 8, 1949, is as follows:

"Act No. 266, Regular Session 1949, approved July 22, 1949, provides that the board of registrars ' . . . send by registered mail, postage prepaid, return receipt requested, written notice, signed and certified to by the chairman of the board of registrars, to the board of registrars of the county or counties where such person states he has been previously registered, that such person has applied for registration and has been registered as an elector in the county where such application for registration is made.'

"Will you please inform me by whom the postage and registration fees, for such purpose, shall be paid?"

In my opinion, answer to your inquiry is found within that portion of Title 17, Section 37, Code of Alabama 1940, providing as follows:

"* * * The cost of the publication of the notices required to be given by the registrars shall be paid by the state, the bills therefor to be rendered to the director of finance and approved by him."

It is apparent from the provisions of Act No. 266, General Acts 1949, approved July 22, 1949, the pertinent portion of which you have set out in your request for opinion, that the written notice therein provided for is a notice which the several boards of registrars are required by law to give and make, and in fact is so referred to throughout the body of such act. It is equally apparent that such act makes no provision for the payment of the expenses thereby incurred.

It is, therefore, my opinion that the payment of such expenses must be governed by the provisions of Title 17, Section 37, supra, above set out, providing that the cost of the publication of the notices required to be given by the registrars shall be paid by the State, the bills therefor to be rendered to the Director of Finance and approved by him. The opinion of this office found reported in Biennial Report of Attorney General, 1932-34, page 262, supports by strong implication, if not directly, the conclusion herein reached. Neither is that opinion reported in Quarterly Report of Attorney General, Vol. 17, page 197, in any conflict with the conclusion here reached for the reason that such opinion does not treat of the same question here presented, that is, the payment of the expense incurred in giving those notices which the board is by law required to give.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1949.

Hon. Roland Cooper, Mayor,
Town of Camden,
Wilcox County,
Camden, Alabama.

Elections—Municipal Corporations.

1. Under the provisions of Act No. 465, General Acts 1945, page 699, the returning officers appointed for municipal elections shall deliver the ballots cast in their respective wards or polling places, together with the certificate of results, to the town clerk, receiving a receipt from such clerk therefor.

2. It is not necessary that any second official count be made of such ballots after delivery to the clerk, the result of such election being ascertained from the certificate of results filed by the inspectors of the election.

3. The ballots cast in such election are to be retained for a period of six months following such election and then destroyed unless contest of such election has been filed, in which event such ballots shall be retained until such contest is finally determined.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of August 9, 1949, is as follows:

"We are holding a special election August 22nd to determine if Camden shall have a Commission form of government.

"I have appointed an election board to canvass the ballots. Please advise the following:

"(1) To whom does the Returning Officer deliver the ballots after they are counted by the election board?

"(2) Is it necessary to have an official count of ballots afterwards?

"(3) If an official count is necessary who makes this count?

"(4) How long are ballots to be held after election?"

In your request, you fail to advise me as to the particular commission form of government to be voted upon in the election of August 22, 1949. However, for the purposes of your inquiry, this omission is of no particular significance inasmuch as the pertinent statutes applicable to the election to be held regarding the adoption of each of such commission forms of government provide that such election is to be held, the vote canvassed, and the result declared in the same manner as provided by law in respect to other city elections: Title 37, Section 40, Code of Alabama 1940; Title 37, Section 84, Code of Alabama 1940; Title 37, Section 91, Code of Alabama 1940; Title 37, Section 111, Code of Alabama 1940. It is, therefore, my judgment that you must look to the general law of the State governing municipal elections for answer to your inquiries. Such law, applicable to all cities and towns of the State not organized under a commission form of government is found set out within Act No. 465, General Acts 1945, page 699, Section 1 of such act providing that:

"Elections in cities and towns of this state shall be conducted according to the general election laws except as otherwise provided in this title. * * *

Answer to your first inquiry is found within Section 14 of Act No. 465, supra, wherein it is provided that:

"On the day of election, the election officials appointed by the council as provided in this article shall conduct the election in all manner as prescribed by the general election laws of this state. Immediately after the polls are closed the inspectors shall proceed to count the ballots, in the manner prescribed by the general election laws of this state, and certify the results of the election in their respective polling places to the council of the city or town. They shall enclose the ballots cast in their respective wards or polling places with the poll list, together with their certificate of results of the election, in the box furnished them for that purpose, and, after carefully sealing the same, deliver the box, with its contents, to the returning officer, and the same shall be immediately delivered by him to the clerk, who shall give to such returning officer his receipt for said box, stating in said receipt the condition of the box when received by him."

You will note, the above statute specifically provides that the returning officer shall deliver the ballots, together with the certificate of results, to the town clerk.

In answer to your second inquiry, I would advise that no further count of such ballots is necessary as the result of such election is to be ascertained by a canvass of the returns made. Section 16, Act No. 465, supra.

My answer to your second inquiry obviates any necessity of giving answer to your third inquiry.

For answer to your fourth inquiry, I refer to the general election laws of the State, for the reason that Act No. 465, supra, contains no provision as to the length of time ballots shall be retained following a municipal election, and for the further reason that such act provides that such municipal elections shall be conducted according to the general election laws, except as otherwise therein provided.

In so referring to the general election laws, I find that it is provided by Title 17, Section 196, Code of Alabama 1940, that ballots shall be retained for a period of six months following an election and then destroyed, unless contest has been made of such election, in which event said ballots shall be retained until such contest is finally determined. In my judgment, such statutory provision is applicable to the election here concerned, and the ballots should be retained for a period of six months following the election.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1949.

Hon. Jeff D. Smith,
Circuit Solicitor,
23rd Judicial Circuit,
Huntsville, Alabama.

Offices and Officers—Impeachment—Municipal Corporations.

A person serving as mayor of an incorporated municipality which by election adopts the commission form of government provided for by Title 37, Sections 89-119, Code of Alabama 1940, enters upon a new term of office as of the date of the adoption of such commission form of government and cannot be subsequently removed from office by impeachment for acts occurring during the prior term during which said officer served as mayor under an aldermanic form of government.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 14, 1949, is as follows:

"The Grand Jury of Madison County during May, 1949 recommended the impeachment of the Mayor of a small city in said county for wilful neglect of duty and corruption in office. The acts complained of occurred between October 1, 1948 and January 1, 1949.

"The above-mentioned Mayor was elected to his office as such mayor in September, 1948 and took office during the early part of October, 1948.

"Before impeachment proceedings could be filed, as directed by the Grand Jury, the people of this city by a petition asked for an election to determine whether or not this small municipality, which is under 1,000 in population should have a Commission Form of Government. This election was held Monday, June 13, 1949, with approximately seventy-three votes in favor of Commission Form of Government and about thirty-seven votes, voting to retain the present Mayor and Board of Aldermen form of Government.

"It is a basic Alabama law that an officer cannot be impeached for alleged misconduct which occurred during a prior term of office.

"The election was held under the provisions of Article 2, Title 37, 1940 Code of Alabama. Section 92 of said article provides as follows: 'Whenever the Commission Form of Government is adopted as herein provided the Mayor or other chief executive officer of said City in office at said time of said adoption, shall become one of the said Commissioners herein provided for and shall hold office as such Commissioners until October first of the fourth year after the date of adoption.'

"I desire your official opinion as to whether or not when the Commission Form of Government was adopted and the Mayor becomes one of the Commissioners, this precludes or bars the impeachment proceedings recently recommended by the Grand Jury on the grounds that the alleged acts complained of occurred during a previous term of office."

It is my opinion that your inquiry must be answered in the affirmative.

In arriving at such conclusion, consideration must be given to the opinion of the Supreme Court of Alabama rendered in the case of *State ex rel. Attorney General v. Hasty*, 184 Ala. 121, 63 So. 559, wherein the Court considered a question similar in nature to that presented by your request for opinion, that is, whether an officer may be removed from a subsequent term of office for, and on account of, his conduct during a previous term. In discussing such question, the Court stated as follows:

"It must be observed that, while the law affords ample means for the indictment and punishment of unfaithful officers and for the removal of same for certain causes, the maximum penalty, under an impeachment proceeding, is the removal and disqualification to hold office under the state for the term only for which he was elected. If an officer is impeached and removed, there is nothing

to prevent his being elected to the identical office from which he was removed for a subsequent term, and, this being true, a reelection to the office would operate as a condonation under the Constitution of the officer's conduct during the previous term, to the extent of cutting off the right to remove him from the subsequent term for said conduct during the previous term. It seems to be the policy of our Constitution to make each term independent of the other and to disassociate the conduct under one term from the qualification or right to fill another term, at least so far as the same may apply to impeachment proceedings, and as distinguished from the right to indict and convict an offending official. * * * (Emphasis supplied.)

In the situation outlined in your request, the officer concerned is the mayor of a small municipality whose removal from office by impeachment has been recommended by the Grand Jury of the county, said recommendation being predicated upon acts occurring during said officer's present term of office. However, you advise me that prior to the initiation of such impeachment proceedings in the circuit court of the county, the municipality of which such person is mayor, has voted to become organized under the commission form of government, provided for by Title 37, Sections 89-119, Code of Alabama 1940. Section 92 of the above-cited statutes provides, in pertinent part, as follows:

"Whenever the commission form of government is adopted as herein provided, the mayor or other chief executive officer of such city in office at the time of such adoption shall become one of the commissioners herein provided for, and shall hold office as such commissioner until October 1st of the fourth year after the date of adoption. * * *

The subsequent Code sections, including Sections 94 and 95, supra, as amended by Act No. 295, General Acts 1945, page 490, make provision for the election of those persons who, together with the incumbent mayor, compose the board of commissioners of the municipality.

It, therefore, appears that although the electors of the municipality have voted to effect a change in the form of government of the municipality, the officer here in question continues as an officer of such municipality, serving as a member of the board of commissioners thereof. Likewise, that under the provisions of Section 92, supra, such officer entered upon a new term of office upon the date of the adoption of such commission form of government, which term extends until October 1st of the fourth year following the date of such adoption.

You inquire as to whether he may be removed from this latter office for acts or conduct occurring during the period such officer was serving as the mayor of such municipality under an aldermanic form of government.

As heretofore stated, it is my opinion that he may not, for the reason that it is clear from the statutes pertaining to the particular form of municipal governmental organization that those persons, including the incumbent mayor, elected to office as members of such municipal governing body hold a definite and well defined term of office, which, in the case of the incumbent mayor, is clearly distinguishable from that term previously held by him as mayor of such municipality. Such being the case, it is my opinion that the situation here presented falls squarely within the scope and purview of the principle enunciated by the Supreme Court in the *Hasty Case*, supra, and the officer here concerned cannot be removed by impeachment for acts occurring while serving as mayor under the term existing prior to the adoption of the new form of municipal government.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 18, 1949.

Hon. F. L. Gaddis,
Probate Judge,
Autauga County,
Prattville, Alabama.

Counties—Autauga County—Chief Clerk of Judge of Probate.

The premium on the bond required of the person employed as Chief Clerk of the Judge of Probate of Autauga County, under the provisions of Act No. 79, Local Acts 1947, page 57, is not payable from the funds of Autauga County, and such county is neither responsible for nor authorized to make such payment.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of June 25, 1949, is as follows:

"About two years ago a bill was passed in Legislature in which the Chief Clerk's of Probate Court salary was to be paid out of the general funds of the county.

"What I wish to know is, since this is placed in the general fund of county can the bond of the Chief Clerk be paid by the county's general fund, or does the chief clerk still have to pay the premium on the bond?

"I will appreciate very much if you will give me your opinion on this matter at an early date, since this comes up in July."

It is my opinion that Autauga County is neither responsible for nor authorized to pay the premium on the bond of the Chief Clerk of the Judge of Probate of the County.

The "bill" to which you refer in your request is that found recorded as Act No. 79, Local Acts 1947, page 57, which act provides that the Judge of Probate of Autauga County may appoint a chief clerk, who holds office at the pleasure of the Judge of Probate and whose salary shall be paid from the general fund of the county. The portion of said local act bearing particular relevancy to your inquiry is Section 4 thereof, which provides as follows:

"Section 4. That said Chief Clerk be required to make bond payable and conditioned as required by law, in the sum of Twenty-five Hundred Dollars."

It is to be noted that said act provides that the chief clerk so appointed be required to make bond payable and conditioned as required by law.

Referring to the general law on this particular subject, I find that it is provided by Title 13, Section 301, Code of Alabama 1940, that:

"Such chief clerk, before he enters upon his duties, must take the oath directed to be taken by the officers of this state, and give bond with surety, payable to the judge of probate, in such sum as he may prescribe, upon which bond such clerk shall be liable to such judge in consequence of any act of misfeasance or malfeasance of such chief clerk in the duties of his office; which bond must be approved by the judge of probate, and filed and recorded in the office of the clerk of the circuit court of the county."

The above statute, in my judgment, prescribes the terms and conditions of the bond to be entered into by the Chief Clerk of the Judge of Probate of Autauga County. From the same, it is apparent that the bond of the Chief Clerk, in the office of the Judge of Probate, is not made for the protection of the county or any of its funds, as the Probate Judge's bond does this, but is made to the Judge of Probate for his protection. Neither the state nor county has any interest in this bond, therefore, the county cannot be made responsible for the premium on such bond. Quarterly Report of Attorney General, Vol. 6, page 162.

It is true that in the former opinion of this office, above cited, the chief clerk there considered was paid by the judge of probate personally, rather than by the county. However, as I have heretofore pointed out, under the provisions of Act No. 79, supra, applicable to

Autauga County alone, the chief clerk is required to enter into the same bond as do those persons serving as chief clerks who are compensated personally by the judges of probate. Hence, I feel that no material distinction exists merely because the Chief Clerk of the Judge of Probate of Autauga County is compensated by the county rather than by the Judge of Probate personally, and it is my judgment that the holding of the former opinion above cited is equally applicable here.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 25, 1949.

Hon. David W. Crosland,
Tax Assessor,
Montgomery County,
Montgomery, Alabama.

Taxation—Ad Valorem Taxes—Municipalities.

The city of Montgomery, having bought in certain property for state and county taxes in June, 1948, cannot charge the redemptioner with city taxes for the tax year 1949.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of July 21, 1949, is as follows:

"A certain house and lot situated in the City of Montgomery, Alabama, was sold in June 1948 for the state and county taxes for 1947 by the tax collector. The City of Montgomery bought this property in at the tax sale.

"On October 26th, 1948, this house and lot was redeemed from the 1947 tax sale through the Probate Office. Since the property was owned by the City of Montgomery on October 1st, 1948, no charge was made for 1949 state and county tax.

"The County Tax Assessor and Tax Collector assess and collect taxes for the City of Montgomery. The tax year for the City of Montgomery for ad valorem taxes runs from October to October.

"Since the City of Montgomery owned the property on October 1st, 1948, subject to the former owner's right of redemption, are there any taxes due the city for the tax year 1949?"

By ordinance duly passed and made effective May 11, 1948, the city of Montgomery adopted the optional method of collecting municipal taxes as provided for in Title 37, Sections 698, et seq., Code of Alabama 1940. Consequently, the city tax year commenced running from October 1 through September 30 annually as of October 1, 1948, and the taxes on the property here considered became assessed for ad valorem taxes on October 1, 1948.

As incorporated in your statement of facts, said property was bought by the city of Montgomery at a tax sale for state and county taxes, the sale being made in June, 1948. Therefore, on October 1, 1948, the property was owned by the city of Montgomery. Property owned by the United States, the state, counties, and municipalities is specifically exempted from state and county ad valorem taxes by Title 51, Section 2, Subparagraph (a), Code of Alabama 1940. It is clear, therefore, that no state and county taxes for the year 1949 should be paid since on the date of assessment for ad valorem taxes, i. e., October 1, 1948, the property was owned by the city of Montgomery. Biennial Report of Attorney General 1934-36, page 667.

However, the question you here pose, as I understand it, is whether or not city taxes are payable by one redeeming from a tax sale for those city taxes that would have been imposed for the tax year 1949, and would have accrued had ownership remained in the redemptioner instead of removing to the city of Montgomery.

It is my opinion that the redemptioner is not liable for the payment of such taxes.

In 51 Am. Jur., Taxation, Section 559, the following is stated:

"Although in the absence of constitutional prohibition, a state or a municipality having general powers of taxation may tax its own property, if it sees fit to do so, in the absence of a manifest intention otherwise, it is a generally accepted principle that the property of a particular body politic, whether used for public purposes or held from the income to be derived therefrom, is not taxable by the same body politic. * *"

Nowhere in our statutes do I find legislation indicating a manifest intention that municipalities be clothed with authority to tax their own property.

In addition, the following is found in 33 Am. St. Rep., page 400:

"As a general rule, public property of whatever nature, whether of the United States or of a state, or any of its subordinate political subdivisions, is not liable to taxation for the purposes of revenue. Such property is exempt on general principles of public policy, and

independently of any express provision to the contrary. * * While most public property is in terms made exempt from taxation, either by constitutional or statutory enactment, still without such protection it is exempt upon general principles for as such property is generally procured by taxation, it would be against principle that the product of one taxation should be made the subject of another. * **

The following is also noted in *Smith v. City of Santa Monica, et al*, 162 Cal. 221, 121 Pac. 920:

“* * To countenance taxation of such property would be to countenance the folly of the sovereign taxing its own property ‘and taking money out of one pocket to put in another.’ * **”

While I do not find an Alabama case specifically on point, it is my opinion, in view of all authorities considered, that the city of Montgomery is without authority to charge the city ad valorem taxes here considered against the redemptioner. In so holding, I am not unmindful of Title 37, Section 691, Code of Alabama 1940, which reads as follows:

“§ 691. Redemption by municipality.—The city or town may redeem property at any sale made by the state for taxes, upon the same terms as required by law for owners to redeem, and no person shall be allowed to redeem from the municipality, without paying to the city or town the amount paid to redeem such property and all claims of the city or town thereon for taxes, and penalties or otherwise, and no redemption shall be made in any case from the municipality, or from a purchaser after two years from the date of the sale.”

It is my opinion that this statute, in requiring payment of “all claims of the city or town thereon for taxes, and penalties or otherwise,” makes it mandatory in the instant case for the redemptioner to pay all city tax claims, penalties, etc., that accrued previous to the time that the property became municipally owned, and that the statute must be limited strictly to this scope of operation.

Additional comment is also made that this opinion does not entertain consideration of Act No. 578, General Acts 1943, page 580, which act was intended to amend Title 51, Section 304, Code of Alabama 1940. This is for the reason that this office in Quarterly Report of Attorney General, Vol. 32, page 70, held the above quoted amendatory act unconstitutional as violative of Section 45, Constitution of Alabama 1901.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 25, 1949.

Hon. F. B. Lloyd,
Judge of Probate,
Crenshaw County,
Luverne, Alabama.

Constitution of 1901—Jurors—Crenshaw County.

1. A general act setting the fees of jurors at a rate different from that fixed by local law must be held to supersede the local law in order to prevent the general law from being invalid under the provisions of Section 96 of the Constitution of Alabama 1901.

2. Fees of jurors are "costs and charges of courts" within the meaning of Section 96 of the Constitution, and must be uniform throughout the State.

3. Jurors in Crenshaw County are entitled to \$4.00 per day under the provisions of the general law rather than \$3.00 under the local law.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of August 9, 1949, is as follows:

"You are requested to advise me in regards to provisions of Local Acts 1923, Page 271, approved September 27, 1923, which provides for payment of jurors in Crenshaw County.

"Provisions of the General Statute, Title 11, Section 98, Code of 1940, prior to Amendment by General Acts 1947, page 148, approved August 7, 1947, was in agreement with the local act of 1923 referred to in the preceeding paragraph in that the compensation of Jurors was \$3.00 per day and five cents per mile for each mile traveled in going to and returning from Court.

"The amendment of the General Statute increased the compensation of Jurors to Four Dollars per day.

"Does the Amendment of the General Statute affect the local statute, and should we pay Jurors \$3.00 or \$4.00 per day.

"In considering the question you are requested to consider the Constitutionality of the Local Act.

"The records of the Court are now under examination by the Department of Examiners of Public Accounts and your early advice will be appreciated."

In my opinion, jurors serving in Crenshaw County are entitled to \$4.00 per day under the provisions of the general law (Title 11, Section 98, Code of Alabama 1940, as amended by Act No. 297, General Acts 1947, page 148), instead of \$3.00 per day as provided for in the local law (Act No. 401, Local Acts 1923, page 271).

The local act of 1923, *supra*, applying to Crenshaw County, set the compensation of jurors at \$3.00 per day. Such compensation was the same as that provided for in the general law. Title 11, Section 98, Code of Alabama 1940. On August 7, 1947, the general law was amended by Act No. 297, *supra*, and the pay of jurors was set at \$4.00 per day. The question is, therefore, whether the provisions of the local act of 1923 governs the pay of jurors in Crenshaw County, or whether the general law of 1947 governs the pay of jurors.

In my opinion, the Legislature, in enacting Act No. 297, *supra*, which was an amendment to the general law, must have intended that said general law be applicable to all counties in the State other than those counties which, by constitutional amendment, are excepted from the provisions of Section 96 of the Constitution of Alabama 1901. Section 96, *supra*, provides:

"The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

Had the Legislature intended that the general act of 1947, *supra*, not apply to Crenshaw County, this act would be unconstitutional under the provisions of Section 96 of the Constitution, *supra*. The general act of 1947 must, therefore, be given a meaning which would not result in its unconstitutionality. It is my opinion, therefore, that the general law of 1947, *supra*, raising the pay of jurors to \$4.00 per day applies to Crenshaw County, and that the local act of 1923, in respect to the amount to be received by jurors in Crenshaw County is inoperative. *Barnes v. State*, 239 Ala. 596, 162 So. 406; *Daly v. Johnson*, 225 Ala. 7, 141 So. 909.

In the *Barnes* case, *supra*, it was held that a general act setting fees of witnesses at seventy-five cents per day had effect in Dallas County, wherein a local law provided that said witnesses should receive fifty cents per day. The Supreme Court held that Section 96 of the Constitution of 1901 required that the general law be applied in all counties, including Dallas, otherwise it would be unconstitutional.

It is further my opinion that fees of jurors are "costs and charges of courts" the same as witness fees, which must be uniform throughout the State.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 25, 1949.

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

Sheriffs—Counties—Jails.

1. A county may pay the salary of an attendant or night watchman employed at the county jail, even though said employee is also employed as a deputy sheriff, provided the duties of said employments do not conflict.

2. A county may pay the salary of a janitor employed at the county jail, even though said employee is also employed as a deputy sheriff, provided the duties of said employments do not conflict.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of May 23, 1949, is as follows:

"St. Clair County has two courthouses and two Jails, one each at Shaville and one each at Pell City. The Sheriff has a day jailer and a night jailer, the County pays their salary as jailer. Please advise if the County can pay these salaries if the Sheriff works these jailers in the County as deputy sheriffs."

I also have your letter of June 29, 1949, which is as follows:

"In reply to your letter of June 13th, in regard to Jailers, or Attendants, or Night Watchmen which I have asked an opinion from your office, the Sheriff of St. Clair County is on fee basis and we have always paid for Jailers, or Attendants, or Night Watchmen, which ever you choose to call them. We are paying this under Title 45, Section 185 of 1940 Code, there is no question about the County paying for Jailers or Night Watchmen at the Jail, the ques-

tion is if it made any difference when the Sheriff uses the Jailers or Night Watchmen as Deputy Sheriffs out in the County even though the County does not pay any additional amount for these Night Watchmen to act as Deputies.

"What I wanted to know is if by the Sheriff using them as Deputies whether it will affect our authority for paying them as Night Watchmen, Attendants or Jailers."

In my opinion, there is no reason to prevent the county from paying watchmen or jail attendants even though night watchmen or attendants are further employed by the sheriff as deputies. Of course, if the duties of said employees when they are acting as deputy sheriffs are such as would conflict with their duties as night watchmen, or jail attendants, then the county should not pay said employees.

The jail or jails of the county are under the supervision and control of the sheriff. Title 45, Section 115, Code of Alabama 1940. The sheriff is authorized to appoint a jailer, but is not required by law to do so, unless the sheriff thinks that a jailer is necessary. Title 45, Section 115, supra; Quarterly Report of Attorney General, Vol. 21, page 45. A jailer is an employee who stays in the jail and performs those duties prescribed by the sheriff by committing prisoners to jail, releasing prisoners from jail, and performing other duties which jailers ordinarily perform. In my judgment, such an employee is an employee of the sheriff and not the county. It would follow that the sheriff is responsible for paying a jailer; that is to say, a person who performs the duties of a jailer.

Whether a sheriff employs a jailer or not, there must be a night watchman for the jail, unless the Department of Corrections and Institutions has waived the requirement for a night watchman. Title 45, Section 185, Code of Alabama 1940. The primary duty of such night watchman is to stay at the jail at night. This type of an employee would be paid by the county. Title 45, Section 185, supra.

There is another type of employee that may be employed at the jail. This is a janitor. The duties of such employee are to keep the jail clean and perform other duties prescribed by the sheriff. Such an employee may be paid by the county. Title 45, Section 172, Code of Alabama 1940. A janitor is not an employee of the sheriff, but is an employee of the county.

Of course the sheriff may employ and pay out of his own funds as many deputies as he may require. Such deputies may be required to work in and around the jail. This is a matter that addresses itself wholly to the sheriff.

According to your inquiry, there are persons working at the jail both night and day who also act as deputies to the sheriff. In my opinion, there is no legal objection to such employment provided the duties of

their employment do not conflict. For example, a person employed by the sheriff as a night watchman to remain at the jail at night and watch is paid by the county for performing that service. Such an employee should not be so paid by the county if he is required by the sheriff to leave the jail, serve writs, make arrests, and perform other duties which would prohibit him from watching. There is no reason, however, that such a night watchman could not act as deputy sheriff at other times when he was not on duty as a watchman.

Neither is there any reason why a janitor who is also paid by the county for performing janitor services should not also be a deputy sheriff at times when he is not working as a janitor.

Deputies, of course, being paid wholly by the sheriff, would perform such duties as the sheriff directed without conflicting duties.

You are advised, therefore, that although night watchmen employed under the provisions of Title 45, Section 185, *supra*, and janitors who are employed under the provisions of Title 45, Section 172, *supra*, are also deputy sheriffs, there is no reason to prevent the county from paying such employees so long as their duties as deputy sheriffs do not prevent them from performing their duties as janitors or night watchmen.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 26, 1949.

Hon. Douglas C. Martinson,
Judge, Inferior Court,
Madison County,
Huntsville, Alabama.

Madison County—Inferior Courts—Costs and Fees.

1. Unclaimed witness fees of the Inferior Court of Huntsville must be considered as fiduciary funds in the hands of officials and should be disposed of in accordance with Title 58, Sections 30, *et seq.*, Code of Alabama 1940.

2. The judge of the Inferior Court of Huntsville may sentence a defendant to hard labor for the county upon his failure to pay costs.

3. Quarterly Report of Attorney General, Vol. 39, page 60, modified.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of May 31, 1949, is as follows:

"In Re: (1) Disposition of unclaimed witness fees in the Inferior Court of Huntsville.

"(2) Whether or not a justice of the peace can sentence to hard labor for non payment of costs.

"Your opinion is respectfully requested to clarify the following matters pertaining to the unclaimed witness fees in Justice of the Peace Courts and courts of like jurisdiction.

"The Inferior Court of Huntsville, Madison County, Alabama, was created by a Local Act of the Legislature approved April 14, 1911 (in lieu of all justice of the peace courts of Precinct One, Madison County, Alabama) Local Acts 1911, page 215, granting it jurisdiction of the Justice of the Peace Court and courts of like jurisdiction.

"Section 12 of the Act provides as follows: The fees and costs of said court shall be the same as are now allowed to Justices Court of this State and shall be collected by the Clerk of said Court. All of the costs and fees so collected by him shall be paid into the Treasury of Madison County once in every month. (Local Acts 1911, page 218, approved April 4, 1911.)

"At the present time all costs and fees are being paid into the Treasury of Madison County, Alabama once every month with the exception of the unclaimed Witness Fees, which are being held and now amount to approximately \$700.00.

"On June 25, 1945 in reply to a letter written by Judge William H. Blanton, then Judge of the Inferior Court of Huntsville, said letter written to the Attorney General requesting an opinion on the following question, 'What is the disposition of unclaimed witness fees in Justice of the Peace Courts?' The Attorney General then William N. McQueen said, 'This question is not answered because it does not appear that this question has any relation to your court.' (Quarterly Report of the Attorney General of Alabama, Volume 39, page 60).

"Since it is evident that this question is pertinent and pertains to this Court for that we now have on hand approximately \$700.00 in UNCLAIMED WITNESS FEES belonging to WITNESSES who

have appeared in Court and earned the same, your opinion is requested on the following questions:

"(1) When witness fees are collected by the Inferior Court of Huntsville what disposition should be made of said fees if they are unclaimed?

"(2) What is the disposition of unclaimed witness fees in Justice of the Peace Courts?

"Title 13, Section 384, Code of Alabama 1940 provides that it shall be unlawful for a Justice of the Peace or Notary Public with powers of a Justice of the Peace to sentence any person to hard labor for non-payment of costs. However an amendment to the Act creating the Inferior Court of Huntsville (A LOCAL ACT) permits the Judge of the Court on the failure of the defendant to pay the costs to sentence to hard labor. Since there is a conflict between a general statute and a Local Act, I would like your opinion to the following question.

"(1) Can the Judge of the Inferior Court sentence any person to hard labor for the non-payment of costs?

"So that you might not think the above question a hypothetical question, I would like to state that the Judge of the Inferior Court of Huntsville has so sentenced a defendant to hard labor for the non-payment of the costs.

"Since the opinion of the Attorney General on June 5, 1945 was so manifestly wrong on the construction of Section 12 which pertains to costs and fees (costs of Court and Officer's fees) not WITNESS FEES, I respectfully request that this opinion be withdrawn and a correct opinion given, bearing in mind the INFERIOR COURT OF HUNTSVILLE IS NOT A COURT OF RECORD and is regulated under the Statutes pertaining to JUSTICES OF PEACE COURTS, to the end that this Court can properly disburse the funds in the amount of \$700.00 now on hand and that it might know where to disburse these funds in the future."

Your questions relating to disposition of unclaimed witness fees are categorically set forth and answered as follows:

"(1) When witness fees are collected by the Inferior Court of Huntsville what disposition should be made of said fees if they are unclaimed?"

The Inferior Court of Huntsville, Alabama, is not a court of record. Therefore, disposition of unclaimed witness fees is not be construed as within the scope of Title 11, Section 55, Code of Alabama, 1940, which

relates only to disposition of unclaimed witness fees arising in courts of record.

You refer to the opinion of this office reported in *Quarterly Report of Attorney General*, Vol. 39, page 60, wherein the following is stated in part:

"It is my opinion that witness fees which have been collected should be paid into the Treasury of Madison County once in every month according to the provisions of Section 12 of the Local Act quoted above. As you will note, Section 12 provides that 'all of the costs and fees so collected by him shall be paid into the Treasury of Madison County once in every month.'"

You point out that this holding is in error in holding that unclaimed witness fees should be paid into the Treasury of Madison County once in every month in accordance with Section 12 of the Local Act.

Section 12, which you quote in your letter of request for an official opinion, states in effect that the fees and costs of the Inferior Court shall be the same as those allowed justice of the peace courts and that they shall be collected on this basis by the clerk of the Inferior Court. Section 12 then provides that "all costs and fees" so collected by the clerk shall be paid into the Treasury of Madison County once each month. You make the distinction that "costs" as noted in the statute refers to the actual court costs and that "fees" as noted in the statute relates to officers' fees. Therefore, the conclusion is reached that witness fees should not be turned in "once in every month." Your contention appears sound and is substantiated by obvious legislative intent in the practical application of this legislation. The officers of the Inferior Court of Huntsville are on a salary basis (Act No. 213, Local Acts 1911, page 215, as amended by Act No. 91, Local Acts 1943, page 57), and the manifest purpose of the wording of Section 12, *supra*, is to pay into the county treasury on a definite schedule all monies inuring to the court and its officers. Witness fees are not monies that inure to the court or its officers, but are amounts that rightfully belong to individuals, i. e., witnesses, who have earned them. The court merely holds this money for the benefit of said individuals or witnesses. Therefore, it is my opinion that witness fees should not be paid once each month into the county treasury along with costs inuring to the court and the fees of its officers. The opinion reported in *Quarterly Report of Attorney General*, Vol. 39, page 60, is thus modified to this extent.

When these witness fees thus retained are unclaimed, it is my opinion that they are to be considered as fiduciary funds in the hands of officials as noted in Title 58, Sections 30, et seq., Code of Alabama 1940. Section 30 thereof reads as follows:

"§ 30. Fiduciary funds in hands of register, probate judge, sheriff, and clerk to be reported.—Every register, probate judge, sheriff,

clerk, and clerk and register shall prepare a report in writing showing the amount of all fiduciary funds in the hands of such official designating the name of the owner, the case or the circumstances under which the same was received, which statement shall be verified." (Emphasis supplied.)

Section 31 reads as follows:

"§ 31. Fiduciary funds defined.—Fiduciary funds as used in this chapter shall include any sums whatsoever which have come into the hands of such officer and of which he is not the absolute and unqualified owner; **including witness fees** and other fees or funds to which any person is entitled, other than himself." (Emphasis supplied.)

Section 37 reads as follows:

"§ 37. Funds to be paid into county treasury after five years.—If at any time it should appear to the court, or be made known to the court, that any balance has been in the hands of any officer for a period of five years and the same remains unclaimed, it may make an order directing the same to be paid into the treasury of said county, and a separate account shall be kept of all such payments and so designated as to identify each transaction."

Section 38 reads as follows:

"§ 38. May be paid out on order of court to owner.—Any person entitled to any amount so paid into the treasury or any part thereof may within ten years after such payment into the treasury recover the amount to which he may be entitled, without interest, by obtaining an order from the court under whose order the same was paid into the treasury. Such order may be made by the court on summary motion against the probate judge of the county after five days' notice unless the court for sufficient reasons continued the hearing to a further time."

It is my opinion that unclaimed witness fees of the Inferior Court of Huntsville, Alabama, should be disbursed in the manner above outlined.

Your second question relating to witness fees is as follows:

"(2) What is the disposition of unclaimed witness fees in Justice of the Peace Courts?"

While the Inferior Court of Huntsville, Alabama, by virtue of its action of creation, operates in lieu of Justices of the Peace and Notaries Public with the power of justices of the peace, it is in fact a special court created by statute and must function in accordance with those statutes applicable to it as a special court and not as a justice of the peace court. In view of this fact, and the fact that disposition of unclaimed witness fees for the Inferior Court of Huntsville has been spe-

cifically outlined for you above, it is not deemed necessary to answer question (2) above relating to justice of the peace courts.

Relative to the authority of the Judge of the Inferior Court of Huntsville to sentence a defendant to hard labor upon his failure to pay costs, you post the following question:

“(1) Can the Judge of the Inferior Court sentence any person to hard labor for the non-payment of costs?”

Act No. 77, Local Acts 1931, page 19, amended Act No. 213, Local Acts 1911, page 215, creating the Inferior Court of Huntsville by providing as follows:

“Section 1. BE IT ENACTED BY THE LEGISLATURE OF ALABAMA, that Section 6 of an Act entitled ‘An Act to establish in precinct one in Madison County, Alabama, an Inferior Court in lieu of all Justices of the Peace and Notaries public with the powers of a Justice of the Peace in the said precinct, to be known as the Inferior Court of Huntsville, to define the jurisdiction and powers of said court and the Judge thereof,’ Approved April 4th, 1911, be and is hereby amended so as to read as follows: Section 6. Said Judge shall have and exercise the same powers and authority that are now by law conferred on Justices of the Peace or may hereafter be conferred on them and shall have power and authority to sentence to hard labor for the county for non-payment of costs any person or persons convicted in said court; he shall have the rights to solemnize the rites of matrimony, administer affidavits or oaths, take acknowledgements of deeds, mortgages and other conveyances, and take recognizances.” (Emphasis supplied.)

As commented on in answer to question (2) above, the Inferior Court of Huntsville is a special court created by the Legislature and is governed by the special law applicable to it and not the general law applicable to justice of the peace courts. The Legislature has seen fit to pass a specific statute allowing the Judge of the Inferior Court of Huntsville to sentence any persons convicted in said court to hard labor for the county for non-payment of costs. This statutory extension of authority, in my opinion, is not inhibited by any constitutional restrictions and is within the legislative prerogative. My answer is therefore that the Judge of the Inferior Court of Huntsville may sentence a defendant to hard labor for the county upon his failure to pay costs.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

August 29, 1949.

Hon. S. D. McKnight,
County Superintendent of Education,
Marengo County,
Linden, Alabama.

Board of Revenue—Counties—County Superintendent of
Education—Marengo County—Telephones.

Official long distance calls and telegrams made by county
superintendent of education may be paid by the county board
of revenue.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of August 3, 1949,
is as follows:

"I request an official opinion on the following:

"1. Under Section 130, Title 52, Code of Alabama 1940, is the
Board of Revenue of Marengo County, Alabama, supposed to pay
for all official long distance telephone calls and telegrams which are
made by the Superintendent of Education of Marengo County, Ala-
bama, in the discharge of his official duties and business."

Your question has been answered in part in an official opinion of
this office found in Biennial Report of Attorney General, 1930-32, page 69.
The above cited opinion construed Section 169 of the School Code of 1927
which is the same as Title 52, Section 130, Code of Alabama 1940. This
opinion stated that the telephone, both local and long distance, was a saver
of time and money when properly used for office business. In my
opinion the same reasoning would apply to telegrams.

Therefore when properly itemized and presented charges for long
distance calls and telegrams made by the County Superintendent of Edu-
cation in official businss may be paid by the Marengo County Board of
Revenue.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 30, 1949.

Hon. S. P. Rainer, Jr., Chairman,
Bullock County Board of Education,
Union Springs, Alabama.

County Boards of Education—Schools—Contracts—Busses.

1. Where a county board of education offers to an individual a contract for a school bus route at a sum certain per month and such offer is not accepted within a reasonable time, the offer lapses and the board legally may contract for the route with another individual.

2. Where a person, contracting with the county board of education for a school bus route, agrees to buy a competitor's bus and "satisfy him on the price," his obligation is discharged by an offer of the fair and reasonable market value of the vehicle.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of August 22, 1949, is as follows:

"The Bullock County Board of Education requests a ruling from you on the following question:

"On May 20, 1949 the Board offered a contract for a bus route to Mr. Ivan K. Pugh at a salary of \$235.00 per month provided he purchased a new bus.

"On June 17, 1949 the superintendent informed the board that Mr. Pugh had declined this contract and stated that he would accept the route for a three year contract at \$250.00 per month. At this same meeting Mr. W. D. Rutland offered to purchase a new bus and body provided the board would give him a three year contract. In the minutes of June 17th the motion was recorded as having carried unanimously.

"On July 15, 1949 the matter of this bus route was taken up again. Two members of the board, Mr. Fred D. Main and Dr. N. A. Staples, stated at the meeting on July 15, 1949 that the minutes as recorded of the meeting of June 17, 1949 were not entirely correct. The superintendent requested that the minutes be corrected and Mr. Adams moved, second by Mr. Tompkins, to award the Fitzpatrick bus route to Mr. W. D. Rutland under the following terms: Mr. Rutland is to be given a contract for three years of nine months each

year beginning in September 1949 at \$235.00 per month provided Mr. Rutland buys Mr. Pugh's new bus and satisfies Mr. Pugh on the price of the bus. Mr. Rutland further agrees to insure his bus. The chairman put the motion before the board. The motion was carried, Mr. Rainer, Mr. Tompkins and Mr. Adams voting AYE and Mr. Main and Dr. Staples not voting.

"After this motion was passed Mr. Ivan Pugh appeared before the board. Mr. Pugh was asked by several members of the board if he would take the route for \$235.00 per month. He stated several times that he would take the route for \$240.00 per month. After considerable discussion Mr. Pugh stated that he would take the route for \$235.00 per month. Then, Mr. Tompkins moved, second by Dr. Staples, that the motion awarding the contract to Mr. Rutland be repealed and rescinded and that the contract for the Fitzpatrick route be awarded to Mr. Ivan K. Pugh at \$235.00 per month for three years of nine months each year beginning on September 5, 1949 provided Mr. Pugh furnishes a new bus and body. Mr. Adams moved, that the awarding of the Fitzpatrick route be postponed and that another meeting be called and Mr. Rutland and Mr. Pugh be requested to appear at this meeting. Mr. Adams's motion failed to get a second. The chairman put the motion made by Mr. Tompkins and seconded by Dr. Staples to a vote. The motion carried, Dr. Staples, Mr. Tompkins and Mr. Main voting AYE and Mr. Rainer and Mr. Adams voting NO.

"On August 12, 1949 Mr. Rutland appeared before the board again. He stated that he felt that the board had made a contract with him, that he was ready and willing to pay Mr. Pugh for the bus. Mr. Pugh then appeared before the board and stated that he felt that he had a contract and that he had not traded the bus to Mr. Rutland. The matter was discussed by the board and Mr. Adams moved, second by Mr. Tompkins, that the superintendent be instructed to confer with the Attorney General of the State of Alabama, and show him the minutes and ask for his opinion with reference to this route. The motion carried unanimously.

"Enclosed is a copy of that part of the minutes pertaining to this route.

"I therefore request your opinion as to which one of these two gentlemen has the route in view of the fact that motions have been passed at different times giving the route to each of them. We request that you give us this opinion as soon as possible in order that this route will begin to operate when school opens on September 5, 1949."

I am of the opinion that the county board of education stands contractually bound to Mr. W. D. Rutland for the school bus route in question. Having met with rejection of its offer first made to Mr. Ivan K.

Pugh, the board then accepted the offer of Mr. W. D. Rutland, and, by action formally inscribed upon its minutes, awarded the contract to him. Such acceptance supplied the element of agreement and bound each party to fulfillment of the contract terms.

The minutes show that the board, by unanimous decision, first offered the route to Mr. Ivan K. Pugh on May 20, 1949, at \$235.00 per month, the offer stipulating that he must purchase a new bus. Mr. Pugh was present when the offer was made, but did not then and there accept the offer. In fact, it affirmatively appears that he was holding out for a higher price of \$250.00 per month, which the board was unwilling to pay. Approximately one month passed and Mr. Pugh still had not accepted the board's offer; on the contrary, the Superintendent states that Mr. Pugh had expressly declined the route at this price.

In the meanwhile the board was faced with the necessity of perfecting a transportation contract for the ensuing school year, or for the next three years, at a price which the board considered reasonable. On June 17, 1949, Mr. W. D. Rutland appeared before the board and offered to meet its terms. These terms, as expressed in the minutes of June 17, 1949, as corrected on July 15, 1949, were that the contract should run for three years, that payment would be made only for nine months during each year, that the first year would begin in September, 1949, that the contract price should be \$235.00 per month, that the bus owner-operator would carry insurance, and that "provided Mr. Rutland buys Mr. Pugh's new bus and satisfies Mr. Pugh on the price of the bus."

Since Mr. Pugh had expressly rejected and refused to accept the contract at \$235.00 per month, the offer to him thereby lapsed. While it may be contended that he did not expressly reject the offer, but was merely negotiating for a better price, the fact remains that the offer stood open almost a month without acceptance. Nothing in the record indicates that the board had agreed to allow its offer to stand for any specific length of time and certain it is that the offer stood for a reasonable length of time without ripening into a contract with Mr. Pugh by virtue of his acceptance. Since the offer had lapsed, whether by virtue of express rejection or the efflux of a reasonable time is immaterial, his attempt at subsequent acceptance, made on July 15, 1949, was without legal effect for the reason that the offer had been withdrawn.

In the meanwhile the board had accepted Mr. W. D. Rutland's offer on June 17, 1949, the exact contract stipulations being found in the minutes of that meeting as corrected on July 15, 1949. A county board of education may not reconsider and rescind its action awarding or cancelling a contract where the vote is complete and vested rights have intervened. See Quarterly Report of Attorney General, Vol. 25, page 27.

The only provision in the contract with Mr. Rutland concerning which uncertainty may arise is the clause "provided Mr. Rutland buys Mr. Pugh's new bus and satisfies Mr. Pugh on the price of the bus."

The clear inference from known facts is that Mr. Pugh, anticipatory to securing the contract, had purchased the new bus. The county board of education, having decided to place the contract elsewhere, obviously was solicitous that he not suffer an unexpected loss by reason of such purchase. That solicitude, however, must of necessity have certain reasonable limitations. Except as regards capacity, quality, and type, it was of no concern to the county board of education whether Mr. Rutland's contract be performed by means of Mr. Pugh's new bus or by means of any other new bus meeting the same transportation standards. Therefore, I construe this proviso simply to mean that Mr. Rutland, in entering into the contract, agreed merely to make to Mr. Pugh a *bona fide* offer of the fair and reasonable market value of Mr. Pugh's new bus. In other words, Mr. Rutland's promise to relieve Mr. Pugh of the new bus, for which Mr. Pugh presumably had no further use, was conditioned upon the latter's willingness to sell at the fair and reasonable market value of the vehicle. In event of failure to consummate a purchase on that basis, it is my opinion that Mr. Rutland was relieved of further responsibility under his contract and now may proceed to discharge his transportation obligation by means of any other conveyance which, in the sound judgment of the county board of education, meets the transportation standards of Mr. Pugh's new bus.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 31, 1949.

Hon. L. A. Goolsby, Mayor,
Town of Pleasant Grove,
Jefferson County,
Route 8, Wylam Station,
Birmingham, Alabama.

Municipal Corporations—Bonds.

1. There is no authority in Title 37, Chapter 6, Code of Alabama 1940, for a municipal corporation to issue bonds for the purpose of lighting an athletic field.

2. Under the provisions of Title 37, Sections 465-466, Code of Alabama 1940, a municipal corporation may borrow money in the manners therein provided for the purpose of lighting a municipal athletic field and pledge War Savings Bonds owned by it to secure such loan.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of December 22, 1948, is as follows:

"The majority of the citizens of this Town desire a modern lighted athletic field. The Civitan Club by a unanimous vote has endorsed the plan and will sponsor it. The Town Council voted unanimously to back this project but want to avoid any legal entanglements.

"We hereby request your opinion of the following proposals, listed in preferred order:

"(1) The Town will issue \$8,000 athletic field bonds and secure them with War Savings Bonds, which we have and are unencumbered.

"(2) The Park and Recreation Board will issue \$8,000 bonds and they will be secured by the above mentioned War Savings Bonds.

"(3) The Park and Recreation Board will issue \$8,000 athletic field bonds with no security furnished by the Town.

"The athletic field will be built on property now owned by the Town and set aside for a park area, under the supervision of the Park and Recreation Board.

"Your early attention and opinions in the matter will be appreciated."

In answer to your three questions, you are advised that I find no provision in Title 37, Chapter 6, Code of Alabama 1940, authorizing a municipal corporation to issue bonds for the purpose of raising revenue to light an athletic field for the use of the citizens of the municipality.

In regard to your inquiries, I direct your attention to Title 37, Sections 465 and 466, Code of Alabama 1940. These sections contain specific authority for a municipality to borrow money for any purpose or purposes, insofar as such loan does not exceed the constitutional limitation in regard to a municipality.

Section 465, supra, provides that a city may borrow money for any purpose or purposes not in excess of any limitation imposed by the Constitution for temporary purposes. This section provides that such indebtedness may be evidenced by negotiable notes or by non-negotiable warrants or certificates of indebtedness, which shall be payable not later than twelve months from the date of issuance, and may be renewed from time to time until the indebtedness shall have been paid. This section further provides that the municipal corporation may pledge as security for such loan any license taxes, ad valorem taxes, rents or revenues from water or any other taxes due or to become due to the city within twelve months from the date of such note, warrant or certificate to secure the payment thereof.

Since you state in your request that your municipality has on hand eight thousand dollars worth of War Savings Bonds, I see no reason why these bonds could not be used as security for this indebtedness.

If you desire to follow the provisions of Section 466, *supra*, then your municipality may borrow money for the purpose of lighting the athletic field and may evidence such indebtedness with interest bearing warrants, notes, or bills payable, which shall mature at such time the governing body may determine not to exceed fifteen years. This section also provides that certain revenues of the municipal corporations may be pledged to secure such loan. I see no reason why the eight thousand dollars worth of War Savings Bonds could not be used to secure a loan obtained under this section.

In the event your city elects to follow the methods set forth in either of the above two code sections, and secure money for the purpose of lighting its athletic field, then the municipality, under the provisions of Act No. 350, General Acts 1945, page 565, may turn such money over to its Park and Recreation Board for the purpose of lighting the proposed athletic field. I might further call your attention to the fact that there is no provision in said Act 350, *supra*, authorizing the Park and Recreation Board to issue its bonds for any purpose.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

August 31, 1949.

Hon. H. E. Hendon,
Tax Assessor,
Macon County,
Tuskegee, Alabama.

Taxation—Exemptions—Airports—Schools—Tuskegee Institute.

Under facts stated, airport owned by Tuskegee Institute and used by it in some of its courses, but leased to Tuskegee Aviation, Inc. under maintenance agreement, not exempt from ad valorem taxation because it is determined that the same is not used exclusively for schools during the entire tax year as required by Title 51, Section 2, Code of Alabama 1940, as amended.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of June 27, 1949, is as follows:

"I request a ruling on the status of Moton Field, owned by Tuskegee Institute, and used by them in some of their courses, although they have entered into an agreement with Tuskegee Aviation, Inc., allowing them it and its equipment under a maintenance plan, with some changes since the war, and some during nineteen forty eight. I am enclosing copies of letters exchanged with Tuskegee Institute and its Attorneys since the new year, or I am sending the originals to you, and have made copies for my files.

"Please advise me if this property is still exempt, as you ruled on August 13, 1942.

"In the event that it is not exempt, advise me as to what is exempt and what is taxable, and whether the year 1949 alone is affected, or should any other years be considered, since the war ended. I have noted upon the assessment each year the non-cost maintenance agreement, and upon this year the new agreement in regard to a small monetary consideration, for the current year."

Definite answers to your inquiries regarding the various types of property under consideration depend on questions of fact in each instance.

Section 91 of the Constitution of Alabama 1901 reads as follows:

"§ 91. The legislature shall not tax the property, real or personal, of the state, counties, or other municipal corporations, or cemeteries; nor lots in incorporated cities and towns, or within one mile of any city or town to the extent of one acre, nor lots one mile or more distant from such cities or towns to the extent of five acres, with the buildings thereon, when same are used exclusively for religious worship, for schools, or for purposes purely charitable."

It may be noted that this constitutional provision is not applicable to the real property in question as said real property consists of six hundred sixty-one acres (as shown by enclosures to your letter of inquiry), which is in excess of the acreage exemption allowed. Also, said constitutional provision does not apply to personal property used for schools. *State v. Bridges*, 246 Ala. 486, 21 So. 2d 316.

Title 51, Section 2, Code of Alabama 1940, as amended by Act No. 639, General Acts 1947, p. 491 (but not here material), provides, in pertinent part, as follows:

"§ 2. Persons and property.—The following property and persons shall be exempt from ad valorem taxation and none other: (a) * * * * * all property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, however, property, real or personal, owned by any educa-

tional, religious or charitable institution, society or corporation, let for rent or hire or for use for business puposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for education, religious or charitable purposes;
* * *

The Charter of Tuskegee Institute, as amended December 1, 1942, provides in Section 10 as follows:

"Be it further enacted, that so long as the property, real and personal, of the said Tuskegee Institute is used for the purpose of education, the same shall be exempt from taxation of any kind."

The above-quoted statutory provision and the charter provision, though broader than the constitutional provision, must be construed in the light of the interpretation placed upon the constitution and statutes by our Supreme Court.

The criteria for determining whether or not the real and personal property in question is exempt from taxation is the use to which it is put for the entire tax year, regardless of the ownership or the use of the proceeds from it. To come within the exemption the property must be used exclusively for schools and during the entire tax year. *State v. Bridges*, supra; *State Tax Commission v. Commercial Realty Co.*, 236 Ala. 358, 182 So. 31; *State v. Alabama Educational Foundation*, 231 Ala. 11, 163 So. 527; *State v. Church of the Advent*, 208 Ala. 632, 95 So. 3; *Anniston City Land Co v. State*, 185 Ala. 482, 64 So. 110.

In a letter addressed to you under date of August 13, 1942, this office held that the real and personal property, as then used, was exempt from taxation as it was used exclusively for school purposes. At that time the airport property and facilities were utilized by Tuskegee Institute under an agreement with the Federal Government, and it was determined that under the terms of that agreement, and the facts connected therewith, the property was used exclusively for school purposes.

According to the enclosures attached to your letter of inquiry, the property now under consideration was, in effect, leased to Tuskegee Institute, Inc. under a maintenance agreement on November 23, 1945, for the purpose of continuing the operation of the aviation field and its facilities. This agreement was modified to include a monthly rental of one hundred dollars per month on January 1, 1948. Some of the property and facilities are now used by Tuskegee Institute in connection with its educational curriculum. Tuskegee Institute does not receive any net financial profit under the original or supplemental agreement. Regardless of the benevolent features involved in regard to the promotion of aviation or the expenses incurred or incurable by Tuskegee Institute, it does not appear from the facts at hand that the property now under consideration as a whole has been used exclusively for schools since November 23, 1945, the date of the agreement with Tuskegee Aviation,

Inc. Therefore, it would not be exempt from ad valorem taxation beyond the tax year ending September 30, 1945, as it must be used exclusively for school purposes for and during the entire tax year.

The premises considered, it is my opinion, based on the facts at hand, that the property in question as a whole is subject to ad valorem taxation for the tax year 1945-46 (assessable as of October 1, 1945, and payable as of October 1, 1946) and subsequent years. Of course, if it is determined on a factual basis that some of the property included in the whole, and separable therefrom for assessment purposes, has been or now is used exclusively for school purposes for and during any entire tax year, it would be so exempt for the tax year or years involved.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 2, 1949.

Hon. T. E. Middlebrooks,
State Drug Inspector,
Alabama State Board of Pharmacy,
CAPITOL.

Pharmacist.

1. Person receiving barbiturate, upon an original prescription, refilled prescription, or by delivery from a practitioner in the course of his practice, should keep the barbiturate in the immediate labeled container until used.

2. It would be a violation of Act No. 314, General Acts 1947, page 179, to transfer the drug to an unlabeled container.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion bearing date of July 27, 1949, is as follows:

"Reference is made to Section 3 of the Alabama General Laws (Regular Session 1947) No. 314 (S112—Graham Wright) approved August 15, 1947, 'To regulate the handling, sale and distribution of barbiturates.'

"A question has been raised in Jefferson County as to the illegal possession of barbiturates in a container not bearing the label

as prescribed under exception (A) and subheads of the above Section and as outlined under (E).

"Under the law, is it required that the person receiving the barbiturates in a container labeled as required by Section 3, keep same in said container until the amount is used or may he transfer the barbiturates to an unlabeled container?"

In answering your question, it is my opinion that a person receiving barbiturate upon an original prescription, refilled prescription, or by delivery from a practitioner in the course of his practice should keep the barbiturate in the immediate labeled container until used, and the barbiturate should not be transferred to an unlabeled container. In my opinion the act requires that the barbiturate be kept in a labeled container at all times, and it would be a violation of the act to transfer the drug to an unlabeled container.

Section 3 of Act No. 314, General Acts 1947, page 179, provides, in part, as follows:

"Section 3. (Prohibited Acts.) Except as provided in Sections 4 and 5, the following acts, the failure to act as hereinafter set forth, and the causing of any such act or failure are hereby declared unlawful. (A) The delivery of barbiturate unless: 1) such barbiturate is delivered by a pharmacist, upon an original prescription, and there is affixed to the immediate container in which such drug is delivered a label bearing a) the name and address of the owner of the establishment from which such drug was delivered, b) the date on which the prescription for such drug was filled, c) the number of such prescription as filed in the prescription files of the pharmacist who filled such prescription, d) the name of the practitioner who prescribed such drug, e) the name and address of the patient, and if such drug was prescribed for an animal, a statement showing the species of the animal, and f) the directions for use of the drug as contained in the prescription; or 2) such barbiturate is delivered by a practitioner in the course of his practice and the immediate container in which such drug is delivered bears a label on which appear the directions for use of such drug, the name and address of such practitioner, the name and address of the patient and, if such a drug is prescribed for an animal, a statement showing the species of the animal. (B) The refilling of any prescription for a barbiturate unless and as designated on the prescription by the practitioner. (C) The delivery of a barbiturate upon prescription unless the pharmacist who filled such prescription files and retains it as required by Section 6. (D) The failure by a practitioner who gives a prescription to a pharmacist by telephone to furnish such prescription to such pharmacist in writing within 72 hours thereafter. (E) The possession of a barbiturate by any person, unless such person obtained such drug on the prescription of a practitioner or in accordance with Section 3 (A) 2. * * *

This act is highly remedial and should be liberally and favorably treated and construed with reference to the evils it was intended to curb. *Heck v. Hall*, 238 Ala. 274, 190 So. 280.

Section 1 of Act No. 314, supra, provides as follows:

"Section 1. (Policy). The Legislature hereby finds that it is essential to the public health and safety to regulate and control the handling, sale, and distribution of barbiturates, as defined in this Act. The purpose of this Act is to regulate and control such handling, sale, and distribution, and, in particular, but without limitation of such purpose, to ensure that the public shall receive the therapeutic benefits of barbiturates under medical supervision to the full extent required to ensure safety and efficacy in their use; to complement and supplement the laws and regulations of the Congress of the United States and the appropriate agencies of the Federal Government affecting such handling, sale, and distribution; to prevent such handling, sale, or distribution for harmful or illegitimate purposes; and to place upon manufacturers, wholesalers, licensed compounders of prescriptions, and persons prescribing such drugs, a basic responsibility for preventing the improper distribution of such drugs to the extent that such drugs are produced, handled, sold, or prescribed by them."

As an aid in construing remedial statutes, the following rule is found in 50 Am. Jur., Statutes, Section 393:

"As in the case of all statutes, the primary rule of construction of remedial statutes is to ascertain, declare, and give effect to the intention of the legislature, as gathered from the language used. In the interpretation of remedial statutes, however, a special effort is made to avoid a technical construction of the language used, and to give it a fair construction so as to promote justice in the interest of the public good. The purpose of the act should be taken into consideration. The construction should be one which would be consistent with, and promote, preserve, and effect, the object of the statute, so as effectually to meet the beneficial end in view, and not one which would defeat the manifest purpose or design of the statute. * * * * * Indeed, it is an old and unshakable rule in the construction of statutes that the intention of a remedial statute will always prevail over the literal sense of its terms, and therefore when the expression is special or particular, but the reason is general, the expression should be deemed general. * * * * *"

In construing this remedial statute to hold that a person who receives the barbiturate in a labeled container could transfer the drug to an unlabeled container, would, in my opinion, destroy the effectiveness of the act. It would, in fact, make it impossible to properly control the sale and distribution of barbiturates.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

September 2, 1949.

Hon. F. G. Hocutt,
Clerk, City of Tuscaloosa,
Tuscaloosa County,
Tuscaloosa, Alabama.

Municipalities—Accounts and Accountants.

A city operating under a commission form of government under the provisions of Title 37, Chapter 4, Article 2 (Sections 89-119), Code of Alabama 1940, as amended, may employ the same accountant to audit the books and accounts of the city for successive years.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of June 16, 1949, is as follows:

"Title 37, of Alabama Code of 1940, deals with Municipal Corporations. Section 445, which is found under Chapter 8, Article 5, states in part as follows: 'In cities and towns the mayor shall at least once a year, appoint an expert accountant who shall make an examination in detail of all books and accounts of the City officials to cover the period since the preceding examination * * * * * but the same person shall not be appointed or authorized to make such examination twice in succession.' This section is found under said Article 5 which has the title 'Mayor.'

"Chapter four of Title 37 of 1940 Code of Alabama is entitled, 'Government, Commission Form Of.' Section 109 of Article 2 Chapter 4 states in part 'At the end of each year the Commission shall cause a full and complete examination of the books and accounts of the city to be made by competent accountants and shall publish in pamphlet form the result of such examination in the manner above provided for publication of statements of monthly expenditures.' There is no provision in such section that same person shall not make the examination twice in succession.

"Will you please give us your opinion as to whether or not the commission in the commission form of government has authority to engage the same accountant for successive years."

It is my conclusion that the prohibition contained in Title 37, Section 445, Code of Alabama 1940, against a city operating under a mayor-council form of government employing the same person twice in succession to audit the books and accounts of the city has no application

to a city operating under a commission form of government under the provisions of Title 37, Chapter 4, Article 2 (Sections 89-119), Code of Alabama 1940, as amended. The audit of the books and accounts of a city operating under the provisions of Title 37, Chapter 4, Article 2, supra, is governed by Title 37, Section 109, Code of Alabama 1940. This section does not contain a prohibition against a city employing the same accountant twice in succession to audit its books and accounts. Had the legislature intended to impose this prohibition on cities operating under a commission form of government, it would certainly have enacted such a prohibition as part of Section 109, supra, and not have relied on the prohibition contained in Section 445, supra, being applied to such cities.

Under the provisions of Section 109, supra, in addition to the audit required to be made at the end of each year, the Governor may at any time have the books and accounts of such cities examined by a State Examiner of Public Accounts, the expense of such examination to be paid by the city. No similar safeguard is imposed on cities operating a mayor-council form of government.

In view of the above conclusions, it is my opinion that a city operating under a commission form of government under the provisions of Title 37, Chapter 4, Article 2 (Sections 89-119), Code of Alabama 1940, as amended, may employ the same accountant to audit the books and accounts of the city for successive years.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 2, 1949.

Hon. Henry W. Smith, President,
Board of Revenue, Etowah County,
Gadsden, Alabama.

Counties—Etowah County—Ad Valorem Taxes.

1. Courthouse property sold by Etowah County to Boston Ground Rent Trust is subject to ad valorem taxes, and current use of property for courthouse purposes under lease agreement held immaterial.

2. Under lease agreement noted, Etowah County may pay the tax collector directly in behalf of the Boston Ground Rent Trust such amount of taxes that are due for the period of the leasehold.

3. In the alternative, Etowah County may pay directly to the Boston Ground Rent Trust an amount equal to the amount

of taxes due for the period of the leasehold, under the lease agreement noted.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of July 12, 1949, is as follows:

"As President of the Etowah County Board of Revenue, and under authority of Title 55, Section 240 of the 1940 Code of Alabama and amendments thereto, I respectfully request an opinion of you on the following questions arising from the following statements:

"Etowah County is building a new courthouse and has sold the old courthouse site to The Boston Ground Rent Trust. Under date of March 19, 1948, Etowah County entered into a lease agreement with Edwin D. Brooks et als, as Trustees under the Boston Ground Rent Trust for the lease of the old Etowah County Courthouse property for a period of 18 months, with the right to extend the lease for an additional period of not more than 6 months.

"Under the terms of said lease, paragraph 3 thereof reads as follows:

"'3. In consideration of the above and foregoing lease, Lessee contracts and agrees to pay to or for the account of the Lessors during the full period of said eighteen months term all carrying charges in respect of said premises payable by the Lessors for or during such term, including, without limiting the generality of the foregoing, any and all ad valorem taxes which may be assessed against or become payable with respect to said property during said term, together with premiums on fire insurance policies with extended coverage in the amount of \$40,000.00 on the buildings and improvements on the premises, said policies to be the property of and loss thereunder to be payable to the Lessors. All such payments on account of taxes and insurance shall be made on written demand of the Lessors not later than the due date thereof and if not made before the due date thereof shall thereafter bear interest at the rate of six per cent per annum.' (Underlining Supplied.)

"The Boston Ground Rent Trust assessed this property with the Tax Assessor of Etowah County on December 30, 1948, but did not place a value thereon, claiming same exempt for 1949 taxes since the property is being used for courthouse purposes. The Etowah County Board of Equalization, thereupon, place a value on the property for tax purposes and the Tax Assessor of Etowah County claims same is taxable.

"Etowah County has been in possession of said premises during the tax year 1949 and contemplates continued occupancy until December 31, 1949.

"Your official opinion is respectfully requested on the following questions:

"1. Is the old Etowah County Courthouse property, now owned by parties other than Etowah County, subject to ad valorem taxes when it is being used exclusively for county courthouse purposes by Etowah County, under a lease agreement?

"2. If your answer to the foregoing question is in the affirmative, can Etowah County, under said lease agreement, legally pay directly to the Tax Collector of Etowah County the amount due in taxes on the old Etowah County Courthouse property for the period of said leasehold?

"3. If your answer to question number 1 is in the affirmative but your answer to question number 2 is in the negative, can Etowah County, under said lease agreement, legally pay an amount equal to the amount of the taxes due on said old Etowah County Courthouse property for the period of said leasehold to the Lessors, Boston Ground Rent Trust?"

You state in your letter of request for an official opinion that Etowah County "has sold the old courthouse site to the Boston Ground Rent Trust." By this statement it is assumed that title to the property under consideration has legally passed to the Boston Ground Rent Trust, and the county has divested itself of all rights or interest connected with said title.

On this basis, it is my opinion that ad valorem taxes on the courthouse property are properly assessed by the tax assessor for the 1949 taxes.

The fact that the county has entered into a lease agreement with the Boston Ground Rent Trust after sale of the property and the passing of title, has no bearing in the matter, even though the property is currently used for courthouse purposes. It is true that Title 51, Section 2, Code of Alabama 1940, as amended by Act No. 639, General Acts 1947, page 491, exempts all property of the county from ad valorem taxes, but said section obviously has no application where title to the property (as here considered) no longer is vested in the county. Nor do I find any statutory exemption from ad valorem taxation that arises because of the current use of the property. Our courts have consistently held that statutes creating an exemption from taxation must be strictly construed. *Brown v. Protective Life Insurance Company*, 188 Ala. 166, 66 So. 47; *State v. Bridges*, 246 Ala. 486, 489, 21 So. 2d 316. It is therefore my

opinion, in the case that you outline, that your first question is properly answered in the affirmative.

Your second and third questions relate to paragraph 3 of the lease agreement set out in your request for an official opinion. The pertinent portion thereof calls for the county, as lessee under the lease agreement, to pay to or for the account of the Boston Ground Rent Trust, as lessor, any and all ad valorem taxes which shall be assessed for the period of time covered by the lease.

Under such a provision, it is my opinion that Etowah County can legally pay the tax collector directly such amount of taxes that are due for the period of the leasehold. This should be done by payment being made by the county in behalf of the Boston Ground Rent Trust.

In the alternative, it is my opinion that Etowah County may pay an amount equal to the amount of taxes due for the period of the leasehold, said payment being made directly to the Boston Ground Rent Trust.

Either of the above procedures would, in my opinion, be in compliance with the terms of the lease agreement above noted. Your second and third questions are answered accordingly.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 2, 1949.

Hon. Julian Bland,
County Solicitor,
Cullman County,
New Leeth Building,
Cullman, Alabama.

Sheriffs—Nonsupport—Costs and Fees.

1. A sheriff is not entitled to any fees or costs in nonsupport cases.
2. When a defendant in a nonsupport case is extradited, and the probate judge makes a certificate under the provisions of Title 34, Section 101, Code of Alabama 1940, then the sheriff is entitled to receive actual expenses.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 28, 1949, is as follows:

"In Cullman County, one and the same Judge serves as Judge of the County Court, Judge of the Probate Court, Judge in juvenile cases, and Judge in Domestic Relations hearings. He is generally referred to as Probate Judge, or County Judge. There has never been a separate Juvenile Court established in this county. The set-up of our courts here is that the Judge holds County Court on the first Monday of each month, and has hearings on non-support cases on the first Tuesday of each month. Other cases in which he sits as Judge he hears them at any time they are set to be heard.

"This inquiry concerns whether or not the sheriff of Cullman County is allowed arresting fees and other costs when he serves, and arrests a defendant where a warrant has been sworn out by the defendant's wife charging the defendant with non-support of his wife and members of his family under 18 years of age. Also, whether or not when a wife signs a warrant for the arrest of her husband, and is signed by the Probate Judge, and designates the warrant as a Domestic Relations hearing, the sheriff is entitled to arresting fees and costs, where he arrests the defendant under this type warrant and commits him to jail.

"In this county, when the sheriff is entitled to arresting fees and costs out of cases resulting from warrants issued by a Probate Judge or County Judge, which is one and the same Judge, and when the costs are paid by the county it is paid out of the county general funds. There is no separate fund for finances in paying the costs of cases for each separate division of courts that the Probate Judge sits on as the Judge.

"I am enclosing the type of warrant that is used in this county for the arrest of a man for non-support, under which a defendant is tried before the Probate Judge and him sitting in a Domestic Relations hearing.

"Where a warrant is taken, like the one attached, for a defendant, and he is arrested and brought into court, in the event the case is dismissed or Nolle Prossed, or the defendant discharged, is the sheriff entitled to his arresting fee, other costs and mileage fees in making the arrest, out of the general fund of the county? In the event the defendant is convicted under a warrant, which is attached, is the sheriff entitled to his costs and arresting and mileage fees, and is it to be charged against the defendant as part of the costs in the case?

"In the Attorney General report from October 1, 1922 to September 30, 1924, on Page 352, is an opinion by Assistant Attorney General O. B. Cornelius, in which he states that a man arrested for non-support in the Probate Court, that the sheriff is not entitled to any cost whatever in any event, in the event of conviction or discharge and bases his opinion on the Act of 1919, Page 176. He also states

that the sheriff is entitled to costs from cases in the Juvenile Court. Will you please advise us if this ruling still holds true in this county where the warrant is issued by the Probate Judge and designated as a Domestic Relations hearing, and signs the warrant as Judge of the Probate Court.

"As Solicitor for Cullman County, I know that a large bulk of the sheriff's services, is serving the type of warrant that I have attached. I have known him to drive his car as many as 60 to 100 miles in the service of merely one of this type warrant, and I have known him to go to other expenses to perform his duty in serving this type warrant, and in bringing a defendant from another state back to this county. In the face of the Act of 1919, and the opinion of the Assistant Attorney General in 1924, how does a sheriff of Cullman County get any expense money, arresting fees, and costs for his services in arresting and performing his duty in serving a non-support warrant?"

"Will thank you for an official opinion on this."

Your questions may be restated as follows:

1. Is the sheriff of Cullman County entitled to an arrest fee or other costs when he arrests a defendant by virtue of a warrant drawn under the provisions of Title 34, Section 90, Code of Alabama 1940?
2. If the warrant or affidavit in such case is designated as a "domestic relations hearing," is the sheriff entitled to arrest fees or other costs, when the defendant is arrested and committed to jail?
3. In the event such case is dismissed or nol prossed, or the defendant discharged, is the sheriff entitled to an arrest fee, or other costs, including mileage?
4. Is the sheriff entitled to any expenses for arresting, returning, and committing to jail a person who is prosecuted for nonsupport?

All of your questions except number 4, supra, are answered in the negative. In answer to your question number 4, it is my opinion that the sheriff is entitled to certain expenses under certain conditions enumerated below.

It is stated as a fact in your inquiry that there is no separate juvenile and domestic relations court in Cullman County. That being true, the probate court has original and exclusive jurisdiction of cases arising under Article 3 of Title 34, Sections 89, et seq., Code of Alabama 1940 (desertion and nonsupport statutes). This jurisdiction is given to the probate court by Title 34, Section 94, Code of Alabama 1940. The warrant and affidavit attached to your inquiry is drawn under the provisions of Title 34, Section 90, Code of Alabama 1940. The printed affidavit enclosed with your inquiry charges the offense described by that Code section. This Code

section appears in Article 3, supra, and it is provided in Title 34, Section 102, Code of Alabama 1940, which section is also in Article 3, supra, that: "There shall be no costs of any kind whatever taxed in cases arising under this article." This office has often held that no costs or fees are taxable in cases provided for in Title 34, Sections 89, et seq., Code of Alabama 1940. See Biennial Report of Attorney General 1922-1924, page 352; Biennial Report of Attorney General 1934-1936, page 191; Quarterly Report of Attorney General, Vol. 36, page 61. It is my opinion, therefore, that the sheriff is not entitled to any arrest fees in nonsupport cases for the reason that the statute expressly prohibits such fees and costs.

The fact that the affidavit or warrant is described as "domestic relations hearing" has no bearing on your inquiry. The proceeding is before the probate court and not before the juvenile court.

In answer to your last question, you are advised that under certain circumstances a sheriff may be paid his expenses for returning to the county a person charged with nonsupport. When the probate judge investigates the facts and circumstances of the case and certifies that in his opinion the charge is well-founded, then all of the costs incurred by the sheriff in bringing back such defendant may be paid out of the county treasury. It is necessary, however, for the court of county commissioners to make an appropriation for such expenses. See Title 34, Section 101, Code of Alabama 1940. The expenses the sheriff would receive under this section are actual expenses, and would not necessarily be the same as arrest fees and other court costs. See Biennial Report of Attorney General 1926-1928, page 187.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

September 2, 1949.

Hon. J. W. Stuart,
Judge of Probate,
Jackson County,
Scottsboro, Alabama.

Nonsupport—Inferior Courts—Juvenile Court—Jackson County—Appeals.

1. Appeals after a conviction for desertion or nonsupport must be taken to the circuit court, unless a local act creates a domestic relations court, and provides for a trial by jury therein.
2. The Jackson County Court created by Act No. 647, Local Acts 1939, page 368, is not a juvenile or domestic relations court within the meaning of Title 34, Section 95, Code of Alabama 1940.

3. There being no juvenile or domestic relations court for Jackson County within the meaning of Title 34, Section 95, Code of Alabama 1940, appeals in nonsupport cases in the probate court should be certified to the circuit court.

4. Local act creating an inferior court and granting to said court exclusive jurisdiction of cases appealed from "all other inferior courts" of the county does not include appeals from the probate court of the county in nonsupport and desertion cases.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 23, 1949, is as follows:

"I request your opinion on the following matter.

"In Jackson County, Alabama, the Probate Court has jurisdiction of cases of desertion and non-support, Title 34, Sec. 94, Code of Alabama, 1940.

"As you know, Jackson County has an Inferior Court known as the Jackson County Court. This Court was created by acts of the Legislature, approved July 10, 1940, Local Acts of Alabama, 1940, page 368.

"Section 17 of that act provided:

"That this court shall have exclusive jurisdiction of all cases appealed from justice of the peace, and all other inferior courts of Jackson County, and all cases appealed from the Mayor's Court, etc.'

"However Title 34, Section 95 of the Code of Alabama provides that appeals in cases of desertion and non-support shall be taken to the Circuit Court.

"In view of the foregoing sections, please advise me as to which court I must certify this appeal.

"As I understand the law, appeals in such cases are to be given preferential attention in the Courts so as to avoid undue delay, and I would appreciate your advising me as quickly as possible so as to avoid further delay."

In my opinion, the appeal referred to in your inquiry should be certified to the circuit court and not to the Jackson County Court.

As stated in your inquiry, the Probate Court of Jackson County has jurisdiction of cases of desertion and nonsupport as provided in Title 34, Section 94, Code of Alabama 1940. The probate court has such jurisdiction because there is no specially created juvenile and domestic relations court for Jackson County.

After a conviction for desertion or nonsupport, the law provides for an appeal. Title 34, Section 95, Code of Alabama 1940, provides in part as follows:

"The defendant, if convicted, shall have the right to appeal to the circuit court of said county where he may have a trial by jury unless it is otherwise provided by law for a jury trial in the act creating said juvenile and domestic relations court. . . ."

In my opinion, this statute requires the appeal to be certified to the circuit court unless there is a special court in the county having juvenile and domestic relations jurisdiction, and unless said juvenile or domestic relations court has provision for a jury trial.

The question is, therefore, can it be said that the Jackson County Court, as created by Act No. 647, Local Acts 1939, page 368, is a juvenile or domestic relations court equipped for a jury trial within the meaning of said Section 95, supra. In my opinion, the Jackson County Court is not such a court.

In view of the fact that the Jackson County Court, as created by Act No. 647, supra, is not a juvenile or domestic relations court, it is my opinion that the appeal from the probate court must, by the terms of Section 95, supra, be certified to the Circuit Court of Jackson County.

As stated in your inquiry, Section 17, Act No. 647, supra, provides that the Jackson County Court "shall have exclusive jurisdiction of all cases appealed from justices of the peace, and all other inferior courts of Jackson County, and all cases appealed from the mayor's courts." In my opinion, the Probate Court of Jackson County, when exercising jurisdiction in desertion and nonsupport cases is not an inferior court within the meaning of said Section 17, supra. Aside from this, however, it is my opinion that the specific manner of appeal as provided for in the general law, Title 34, Section 95, supra, governs over the more general provisions of the local law.

The case referred to in your inquiry should, therefore, go to the circuit court for a trial de novo.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

September 2, 1949.

Hon. Bovell Summers,
Tax Assessor,
Etowah County,
Gadsden, Alabama.

Municipalities—Schools—Taxation.

Where a portion of a county school district becomes a city school district or a portion thereof and subject to the control of the city board of education, the district school tax collected in the city (within the corporate limits) shall be paid over to the custodian of the city school funds and the district school tax collected in the contiguous territory shall be paid over to the custodian of the county school funds, both subject to the proviso stated in Title 52, Section 273, Code of Alabama 1940.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion bearing date of June 9, 1949, is as follows:

"As Tax Assessor for Etowah County, and under the authority granted me by statute, I respectfully request an opinion of you on the questions arising from the following statement of facts:

"On November 7, 1944, the County School District, the Attalla School District and the Gadsden School District voted a special 3 mill district school tax to run for a period of 20 years, beginning October 1, 1946. Each school district voted as a unit and the 3 mill tax so voted applied to each district as such. Since the date that said tax went into effect, the cities of Attalla and Gadsden have extended their corporate limits taking in parts of the County district which, at the time of the above referred tax vote, were not included in the city limits of either city.

"I am interested in having your opinion on the following question:

"Is the County School District still entitled to the 3 mill tax on that portion of the territory now located within the corporate limits of either the City of Gadsden or the City of Attalla, but which, at the time of said tax vote, was a part of the County District territory?"

I assume that there is no question as to the validity of the tax in each of the districts referred to in your inquiry and that the tax is being collected on all property subject to the tax within all three districts.

In my opinion, your inquiry must be answered in the negative.

As a general proposition, one school district is not entitled to the three-mill tax collected in another school district; and where a special three-mill district tax has been levied and collected in a particular district, it can be used for no other purpose than for the benefit of those public schools located or to be located in such district. Biennial Report of Attorney General, 1926-28, page 652; Biennial Report of Attorney General, 1928-30, page 1006; Biennial Report of Attorney General, 1930-32, page 10; Quarterly Report of Attorney General, Vol. 48, page 196; *City Board of Education v. Williams*, 231 Ala. 137, 162 So. 802.

Title 52, Section 273, Code of Alabama 1940, provides as follows:

"Municipality may remain under county board of education; disposition of school tax.—When a municipality under the jurisdiction of a county board of education attains a population of twenty-five hundred or more, according to the last decennial or any subsequent federal census, the schools of the municipality may remain under control of the county board by agreement between that board and the city council of the municipality, which agreement shall be expressed in resolutions adopted by and spread upon the minutes of the two authorities. If the municipality does not enter into such an agreement, the control of the school or schools of the territory within the municipality shall be vested in a city board of education, and thereafter the district school tax collected in the city shall be paid over to the custodian of city school funds, and the district school tax collected in the contiguous territory shall be paid over to the custodian of county school funds; provided, that so much of the proceeds of the special school tax collected in the original school tax district as may be required for the retirement of outstanding warrants issued against such tax, including the interest thereon, shall be paid over to the proper official or authority to be used for such purpose." (Emphasis added).

The Cities of Gadsden and Attalla each have a City Board of Education.

It appears from the above section 273 to be the legislative intent that where a portion of a county school district becomes a city school district or a portion thereof and subject to the control of the city board of education, the district school tax collected in the city (within the corporate limits) shall be paid over to the custodian of the city school funds and the district school tax collected in the contiguous territory shall be paid over to the custodian of the county school funds, both subject to the proviso stated in Section 273, *supra*.

It is, therefore, my conclusion that, under the facts as stated in your inquiry, the county school district is not entitled to the three-mill tax on that portion of the territory now located within the corporate limits of either the City of Gadsden or the City of Attalla, even though at the

time of said tax vote, said portion of territory was a part of the county district. The three-mill tax collected within said portion of territory is to be paid over to the custodian of the city school funds according to the provisions of Section 273, *supra*.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

September 2, 1949.

Hon. D. G. Gill,
State Health Officer,
Department of Public Health,
CAPITOL.

Schools—City Boards of Education—Health and Health Departments.

City Boards of Education are authorized to make appropriations to County Health Departments where the same are to be used exclusively for public health purposes connected with the city school system.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of June 16, 1949, is as follows:

"In opinion rendered me on July 14, 1948, your office held that county boards of education are authorized to make appropriations to county health departments where the same are to be used exclusively for public health purposes connected with the public school system. Question now presents as to whether city boards of education have the same authority, and your opinion on this is respectfully requested."

I am of the opinion that your inquiry should be answered in the affirmative.

Title 52, Section 158, Code of Alabama 1940, provides as follows:

"The city board of education is hereby vested with all the powers necessary or proper for the administration and management of the free public schools within such city and adjacent territory to the city which has been annexed as a part of the school district which includes a city having a city board of education."

Our Supreme Court has concluded that city boards of education and county boards of education have quite similar powers and authority and that the essential function of each is the same. See *State ex rel. McQueen, Attorney General, et al v. Brandon et al*, 244 Ala. 62, 12 So. 2d 319; *City Board of Education of Athens et al v. Williams, Superintendent of Banks, et al*, 231 Ala. 137, 163 So. 802. In *State v. Brandon*, supra, Mr. Justice Thomas thus wrote:

"It may be stated, in short, that the facts in the case are, regardless of what name may be given the body discharging the duties involved here, or regardless of the manner in which the personnel of that body is selected, the inescapable facts are that the essential function being performed by the particular body involved (whether it be the city board of education or the county board, a district or a state board), is fulfilling the duties and the carrying out the policies of the sovereign state in educating its youth, under a system of education which the State of Alabama has established for all its educational effort, supervised, administered and maintained as a system established and perpetuated by virtue of the sovereign right of the state to educate its people. This is the effect of our decisions."

In two previous opinions this office has held that county boards of education are authorized to make appropriations to county health departments where the same are to be used exclusively for public health purposes connected with the public school system. See *Quarterly Report of the Attorney General*, Vol. 52, pages 33 and 35.

Therefore, for the same reasons expressed in my opinions relating to county boards of education, I am of the opinion that city boards of education have the same authority to make appropriations to county health departments where the same are to be used exclusively for public health purposes connected with the city school system.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 2, 1949.

Mrs. Zelma M. DeVane,
Tax Collector,
Coffee County,
Elba, Alabama.

Taxation—Ad valorem Taxes—Exemptions.

Ad valorem taxes on property that has been exempted from taxation by county and city governing bodies, under the pro-

visions of Title 51, Section 3, Code of Alabama 1940, are not to be collected by the county Tax Collector.

Opinion by Assistant Attorney General Livingston.

Dear Mrs. DeVane:

Your request for an official opinion bearing date of July 11, 1949, is as follows:

"The L & M Manufacturing Company, a Corporation, has its principal place of business at Elba, Coffee County, Alabama, and has its plant and equipment located here, and which is a domestic corporation, and has a tax assessment against it in the sum of \$1209.00, which includes state and county taxes and City taxes in behalf of the City of Elba.

"The land and the buildings which are situated on the land, together with the machinery and equipment, was owned by this Corporation beginning about the first of the year of 1948 but not prior thereto. The Company is a garment manufacturing plant and being a new industry they made application to the Commissioners Court of Coffee County in January, 1949, for exemptions as provided under Title 51, Section 3, of the Code of 1940, and likewise made application in January, 1949, for exemptions to the City of Elba. As I understand it, the Commissioners Court of Coffee County and the City Councilmen of the City of Elba have acted favorably on said application giving this new Company a five year exemption.

"With the foregoing facts before you, will you please advise me as Tax Collector of Coffee County if this Corporation will have to pay the taxes which are set up on the Tax Assessor's books and which were put in and made a part of the abstract of taxes which was turned over to me as Tax Collector or can I remit the State its taxes and not collect the taxes due the County and the City of Elba."

From the facts stated in your inquiry, I assume that the exemption granted by the Commissioners Court of Coffee County and the City Councilmen of the City of Elba is legal and proper, and that the assessment of \$1209.00 against the L & M Manufacturing Company is for a year during the exemption period.

Title 51, Section 3, Code of Alabama 1940, which provides for the exemption from ad valorem taxes of certain designated factories, industries and plants, is quoted in part as follows:

"§3. Exemption of certain factories, industries and plants—

* * * the court of county commissioners, or other court or board having like jurisdiction of any county, and the constituted authorities

of any city or town in which it is proposed to locate, or add to, or to extend any such factories or plants, are authorized and empowered to remit the taxes assessed for all county and municipal purposes, except for county school and school district purposes, on such factories or plants and on all extensions or additions to such factory or plant as are already built and operated, and on all plants, works, machinery and other equipment of such factories or plants, or additions thereto, or extensions thereof, and also on all of the capital stock of such factories and plants, or increase of such capital stock made for the purpose of making the additions thereto or extensions thereof for a period not exceeding ten years from the date of the incorporation or organization of such factories or plants, if incorporated and organized under the laws of the State of Alabama, or for a period not exceeding ten years from the date of being granted permission to do business in the State of Alabama, if a foreign corporation, or from the date of completion of such plant or factory, or from the date of the completion of such addition or extension thereof. * * *

A similar situation to the one presented in your inquiry is the subject of an opinion by the Attorney General reported in Quarterly Report of Attorney General, Vol. 37, p. 10, from which I quote the following:

"You state in your inquiry that taxes are assessed and collected on property that has been exempted from certain taxes by the county and municipal governing bodies under the provisions of Title 51, Section 3, supra, and that the amount of taxes collected on such exempt property are remitted to the proper state, county and city authorities. You state further that 'the county and city authorities remit their proportionate share to the taxpayer.'

"It is evident from the procedure set out above that you have construed the expression 'to remit the taxes' found in Section 3, supra, to mean that the county or city shall pay back such taxes. This is not the correct meaning of such expression as used in said Section. The word 'remit' is defined in Webster's New International Dictionary, Second Edition (1936), as follows: '5. To refrain from exacting, inflicting, or enforcing: as to remit a penalty or the performance of an obligation.'

"The expression 'refrain from exacting or enforcing' the taxes could have properly been used in the statute instead of the expression 'to remit the taxes.' It was the intention of Section 3, supra, that exemptions from certain taxes might be granted by the county or municipal governing body, and it was never contemplated that taxes should be collected on such property insofar as it was exempted under the provision of said Section."

In view of the above, it is my opinion that you should pay the State taxes over to the State and refrain from collecting ad valorem taxes

from the L & M Manufacturing Company for Coffee County and the City of Elba during the exemption period.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 7, 1949.

Hon. Henry Crenshaw,
Tax Assessor,
Geneva County,
Geneva, Alabama.

Tax Assessor—Geneva County—Constitutionality.

Act No. 360, H. 738, approved August 9, 1939 (Ms.), authorizing the county governing body of Geneva County to pay out of the county treasury the salary of additional clerks for Tax Assessor and Tax Collector is constitutional.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of August 27, 1949, is as follows:

"House bill number 738, by Faulk, authorized the Governing Body of Geneva to pay \$1,500.00 annually for clerk hire for my office.

"Judge Black has advised me that he cannot pay this clerk salary until he has an opinion from you.

"I will appreciate it if you will advise me whether or not the bill is constitutional."

The Act to which you refer in your request is Act No. 360, H. 738, approved July 9, 1949 (Ms.), which said Act reads as follows:

"Act No. 360

H. 738 — Faulk

"An Act

"To authorize and direct the governing body of Geneva County to pay the salaries of additional clerks for the Tax Assessor and Tax Collector of the county.

"Be It Enacted by the Legislature of Alabama:

"Section 1. The governing body of Geneva County is authorized and directed to pay out of the county treasury the salaries of an additional clerk for the Tax Assessor and an additional clerk for the Tax Collector, to be appointed by the Tax Collector and Tax Assessor who shall also fix each of their salaries at not more than one thousand five hundred dollars (\$1500) per annum.

"Section 2. This Act shall become effective immediately upon its otherwise becoming a law.

"Approved August 9, 1949."

It is to be noted from the above Act that it simply authorizes and directs the county governing body of your county to pay out of the county treasury the salary of an additional clerk in your office, which said salary shall not exceed fifteen hundred dollars (\$1500) per annum, which shall be fixed by the Tax Assessor.

It is a well known rule and maxim of law that unless the Legislature is prohibited by some constitutional provision, it has the power to pass any law it sees fit.

I have not found any section of the Constitution which prohibits the Legislature from passing a local law authorizing the county governing body of any given county of the State to pay the salaries of additional clerks in the office of a county official.

You have not called my attention to any particular section of the Constitution which this Act violates and I have been unable to find any such section.

Therefore, in the absence of any constitutional prohibition, the Legislature had authority to pass Act No. 360, supra, and in my judgment the same is constitutional.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 8, 1949.

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Fireworks—Licenses.

Licensee whose license to deal in fireworks has been rendered partially or wholly ineffective by Act No. 110, General Acts 1949,

Ms., approved June 21, 1949 (prohibiting the possession, sale, disposal, use, or explosion of fireworks in Alabama) is entitled to no refund equal to the unused portion of his license.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of July 20, 1949, is as follows:

"The Legislature passed Act No. 110 recently, which was approved by the Governor on June 21, 1949, at 8 o'clock P.M.

"This is the Act that makes it unlawful to possess, sell, use or store fireworks.

"I have sold several licenses under Section 526 (Sch. 63) of Title 51.

"Since the Licenses which I sold would not expire until September 30, 1949, I have had two persons to demand from me a refund equal to the unused portion of the licenses.

"Will you please give me the benefit of your official opinion as to whether or not a person who purchases fireworks licenses under the above section would be entitled to a refund for the unused part of his license.

"If he is entitled to a refund, what would be the proper procedure, and to whom should the request for a refund be addressed."

A person who has taken out a license to deal in fireworks, etc., under Title 51, Section 526, Code of Alabama 1940, and whose license has been subsequently rendered partially or wholly ineffective by Act No. 110, General Acts 1940, Ms., approved June 21, 1949, is not entitled to a refund equal to the unused portion of his license.

It is well settled that a license is a mere privilege to carry on a business, vocation or occupation, and is subject to revocation at the will of the grantor. *Johnson v. Liquor Control Commission*, 266 Mich. 682, 254 N. W. 577; Title 51, Section 450, Code of Alabama 1940. A license is in no sense a property interest or a vested right of any kind, nor is there any element of contract involved in a license. *Jones v. Motley*, 78 Ala. 370. The Court in the *Jones* case stated at page 372:

"They are mere grants of indulgence, for specified consideration and are granted always under the implied understanding, that they are revocable at the pleasure of the sovereign power granting them.

And this is true, whether the license is intended as a mere police regulation, or for the purpose of raising revenue."

See also: *Foshee v. State*, 15 Ala. App. 113, 72 So. 685.

The Supreme Court of Alabama stated with regard to licenses for the sale of intoxicants:

"It is universally recognized that the act of engaging in the sale of intoxicants may be wholly forbidden, and that a license to engage in the traffic in liquors is a privilege merely, revocable at the will of the superior granting power; that there is in it no element of property right or vested interest of any kind. Being so, it may be a necessary consequence that rules of law, protective of vested rights, are without influence in respect of such a privilege."

(*State ex rel. Crumpton v. Montgomery, et al Excise Commissions*, 177 Ala. 212, 237, 59 So. 294.) The statements concerning licenses to sell liquor are equally applicable to licenses for dealing in fireworks. For a general discussion of this question, see Quarterly Report of Attorney General, Vol. 30, page 61.

The Supreme Court of the United States many years ago decided that the use of property itself could be prohibited in the exercise of police power without the necessity of compensating the person whose use of his property was so prohibited. *Mugler v. Kansas*, 123 U. S. 623. The court stated at page 669:

"A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. . . . The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."

Therefore, the licensees about whom you have inquired are entitled to no refund whatsoever on the unused portion of their licenses.

Very truly yours,

A. A. CARMICHAEL,

Attorney General.

Hon. Jno. D. Chichester, Chairman,
Board of Commissioners,
State of Alabama,
Real Estate Commission,
Montgomery 5, Alabama.

September 8, 1949.

Real Estate—Records.

No statutory authority exists for the recordation of an exclusive listing made with a real estate broker and such an instrument, if recorded, may be expunged.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of July 18, 1949, is as follows:

"Will you please give us your opinion on the following matter:

"CAN A REAL ESTATE BROKER LEGALLY RECORD AN EXCLUSIVE LISTING SECURED BY HIM FROM A CLIENT

"a. at the time such exclusive listing is secured?

"b. anytime thereafter during the term such listing is in effect, in the event the owner disposes of such property individually or through another real estate dealer."

Each half of your question is answered in the negative, since no statutory authority exists for recordation of an exclusive listing made with a real estate broker.

Only those instruments may be recorded which come within the provisions of statutes authorizing their recordation. In the absence of such authority, the clerk or other public officer has no legal authority to record them. Moreover, if unauthorized, the recordation does not operate to give constructive notice of the contents of the instrument to prospective purchasers or encumbrancers of the property. 3 A. L. R. 2d 577, note.

No authority is found in Title 47, Section 95, Code of Alabama 1940, it being well settled that an exclusive listing does not purport to convey any title, interest, or easement in the land, or to create any lien upon it. Being a mere personal covenant between the parties, it is not such an instrument as is entitled to recordation. *Leatherman v. Schwab*, 98 Fla. 885, 124 So. 459; *Witt v. Sims, et al*, 140 Ga. 48, 78 S. E. 467; 53 Corpus Juris, Records, Section 9, page 610. Moreover, if improperly recorded, it may be expunged from the records by mandamus proceedings, since its recordation hinders, delays and obstructs sale of the property. *Leatherman v. Schwab*, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 8, 1949.

Hon. P. G. Lawley,
Tax Assessor,
Fayette County,
Fayette, Alabama.

Municipalities—Taxation—Annexed Territory.

Property which is part of territory annexed to city by Local Act not subject to exemptions from city ad valorem taxation set forth in Title 37, Section 153-154, Code of Alabama 1940.

Opinion by Assistant Attorney General Nachman.

Dear Sir:

Your request for an official opinion bearing date of July 14, 1949, is as follows:

"Please give us your Official Opinion on a local act passed by the Legislature 1945, extending the boundary line of the City limits of the Town of Fayette, Ala., as is shown on page 138 of the local acts of 1945 and which was approved June 28, 1945, effective on approval.

"Under a former law, the County Tax Assessor and Collector are required and are assessing and collecting City Tax on all property situated within the boundary lines of the Town of Fayette, Ala., as established prior to this act above mentioned.

"The above mentioned act states 'Effective on approval' (June 28, 1945) but we have been informed by the City authorities that the ad valorem tax on property lying outside the old City limits, and within the new City line was exempt for a term of five years from approval of said act (June 28, 1945). However, Privilege License are being collected on all doing business within the new limits and all legal voters within the new limits were permitted to vote in our last City election.

"We want to comply with all requirements of law and will thank you for your opinion as to what is required of us under this act. Your immediate attention will be greatly appreciated."

The problem presented by your request is whether property which was brought within the city limits of the Town of Fayette by Act No. 270, Local Acts 1945, page 138, approved June 28, 1945, is exempt from city ad valorem taxation for 5 years after the effective date of said act. It is my opinion that such property is not exempt for any period of time.

The 5-year exemption set forth in Title 37, Section 154, Code of Alabama 1940 and the 10 to 15-year exemption set forth in Title 37, Section 153, Code of Alabama 1940, apply only to property which is brought within the corporate limits of a city pursuant to provisions of Article 2, Title 37, *supra*. In other words, these exemptions apply only to property included within the extension of corporate limits as extended by the city itself according to Title 37, Sections 138, *et seq.* These exemptions do not apply where the boundaries of the city have been extended by a local act of the Legislature. Statutes which create an exemption from taxation must be strictly construed against the taxpayer. *Brown v. Protective Life Insurance Company*, 188 Ala. 166, 66 So. 47.

Johnson, Tax Assessor v. State ex rel. City of Birmingham, 245 Ala. 499, 17 So. 2d 662, is a case in point. In that case property was annexed and incorporated into the City of Birmingham on August 11, 1943, pursuant to a local act of the Legislature. By an ordinance adopted May 25, 1943, the City of Birmingham had levied a tax on all real and personal property and other properties and franchises in the City of Birmingham. These taxes were to be levied for the city tax year beginning on October 1, 1943. The Alabama Supreme Court held that the annexed territory was subject to the municipal taxes for the tax year beginning October 1, 1943. See also: Quarterly Report of Attorney General, Vol. 51, page 238.

To reiterate, the property lying without the old city limits but within the new city limits should not be exempt for a term of 5 years following the approval of the local act in question.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 8, 1949.

Hon. Frank J. Tipler, Jr.,
Deputy Solicitor,
22nd Judicial Circuit,
Covington County,
Andalusia, Alabama.

Extradition—Revocation of Warrant.

The Governor under the provisions of Title 15, Section 69, Code of Alabama 1940, has the authority at any time to recall his rendition warrant in an extradition matter.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of August 23, 1949, is as follows:

"Re: Howard Hughes.

"The above party was arrested by the Sheriff of Covington County on warrant of the Governor of Alabama for extradition to Florida. The defendant filed a writ of habeas corpus in the Circuit Court of Covington County, Alabama, but the writ was denied, on evidence taken before the court, and the petitioner remanded again to the Sheriff's custody. From this ruling, the petitioner appealed to the Court of Appeals, where the appeal is now pending.

"Under date of August 15, 1949, after the arrest and after the hearing and appeal taken, the Governor of Alabama has requested the Sheriff to return the warrant to him, to the end that he might have another hearing on the matter.

"Please advise me if the Governor under the above circumstances has any authority to request return of the warrant and to have another hearing on the matter. Does he have jurisdiction to recall the warrant above mentioned and now deny extradition which he granted."

The right of a state to demand the extradition or rendition by another state of a person who has committed an offense against the laws of the demanding state, and has thereafter fled to the asylum state, is founded on and controlled by the Constitution of the United States and Federal statutes. It has many times been held that the proceedings for interstate extradition constitute a purely executive function. *Day v. Keim*, 2 Fed. 2d 966. It, therefore, appears that interstate extradition is a matter wholly under the control and supervision of the Governor of the asylum state.

Your attention is directed to Title 15, Section 69, Code of Alabama 1940, which reads as follows:

"§ 69. Governor may recall warrant or issue alias. The governor may recall his warrant of arrest, or may issue another warrant whenever he deems proper."

While I do not find any Alabama case construing the above code section, I do find that all of the text books on extradition, as well as many cases from other jurisdiction, uphold the right of the Governor to revoke a warrant of rendition as long as the alleged fugitive is in the asylum state.

This proposition is very potently stated in 35 C.J.S., Section 16, Subhead (e), which is as follows:

"If a warrant has been issued in a case in which it should not have been issued, the governor may revoke it whether it was issued by himself or his predecessor, and this power exists regardless of any lapse of time between the granting of the warrant and its attempted revocation where the alleged fugitive remains within the state during the interim. On the other hand, the revocation to be effective must be issued before the alleged fugitive is taken from the asylum state.

"The courts have on the ground of impropriety declined to review the action of the governor in revoking a warrant or in refusing to revoke it."

In view of the above quoted code section and in light of the holding of the courts of other jurisdictions on this matter, you are advised that the Governor may at any time recall his warrant of arrest as long as the alleged fugitive remains in the State of Alabama.

It, therefore, follows that both of your questions must be answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 12, 1949.

Hon. G. H. Wright,
President, Board of Commissioners,
City of Auburn,
Auburn, Alabama.

Municipalities—Officers and Offices.

1. When a municipal government changes from mayor-board of aldermen form to that of city commission form, the previously existing water works board becomes abolished at the date of change by virtue of Title 37, Section 45, Code of Alabama 1940.

2. Members of the previously existing water works board, unless reappointed by the city board of commissioners after the city commission form of government becomes established, are not lawfully in possession of their offices.

3. A city board of commissioners has authority under Title 37, Section 50, Code of Alabama 1940, to appoint new directors of the water works board.

4. Under authority of Title 37, Section 50, Code of Alabama 1940, members of a water works board may be removed at the pleasure of the city board of commissioners.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of July 14, 1949, is as follows:

"The undersigned President of the Board of Commissioners of the City of Auburn, Alabama, respectfully requests your opinion as to the questions set out below.

"The water-supply system of the City of Auburn is owned and operated by a Waterworks Board, created under the provisions of Title 37, Chapter 7, Article 5, Sections 394-402, of the Code of Alabama (1940), as amended by the Act of 1943, page 306, approved June 28, 1943, and as amended by the Act of 1943, page 575, approved July 10, 1943.

"In accordance with the statute, a three-man board of directors was appointed by resolution of the City Council of the City, held on January 6, 1948, the resolution providing, of course, for staggered terms.

"On July 20, 1948, the form of the city government was changed from the mayor-council type to the commission type, under the provisions of Title 37, Chapter 4, Article 1, Sections 35-88, Code of Alabama (1940).

"At the time of the change-over, the newly constituted Board of Commissioners did not change the personnel of the Water-works Board and took no official action in regard to it. In view of the provisions of Title 37, Section 45, the undersigned should appreciate your opinion as to the following questions:

"(a) Was the Waterworks Board as constituted on January 6, 1948, abolished by the change in the form of the city government?

"(b) Are the members appointed on January 6, 1948, lawfully in possession of their offices?

"(c) Assuming that your answer to question (b) is in the negative, does the Board of Commissioners now have the authority to appoint new directors for the Waterworks Board?

"(d) Irrespective of any change in the form of the city government does the Board of Commissioners have the power to remove from office for cause a member of the Waterworks Board?"

Title 37, Section 45, Code of Alabama 1940, to which you refer, reads as follows:

"§ 45. Board of commissioners; powers of.—The commissioners of such city, to be known as the board of commissioners of such city, shall have, possess and exercise all the powers and authority, legislative, executive, and judicial, possessed and exercised by the mayor and board of aldermen and board of police commissioners, and any and all other boards (except board of education), commissions and officers of said city of any and every sort whatsoever; and all such boards, commissions and officers (except those provided for by this article) shall then and thereby be abolished and the terms of office of any and all such officers or officials shall then and thereby cease, exception boards of education. Such city shall continue its existence as a body corporate under the name of 'City of _____' (inserting the name of such city). It shall continue to be subject to all the duties and obligations then pertaining to or incumbent upon it as a municipal corporation, and shall continue to enjoy all the rights, immunities, powers, and franchises then enjoyed by it, as well as those that may thereafter be granted to it." (Emphasis supplied.)

It appears clear from a reading of the above Code section that when a municipality changes its local government from a mayor-board of aldermen form of government to a city commission form of government, and a city board of commissioners is duly established, said city board of commissioners assumes all authority previously vested in the mayor, board of aldermen, and all other boards (except the board of education) under the old form of local government. It is particularly noted that all such old boards are abolished and the terms of all officers thereof cease at the time the new city board of commissioners is formulated.

To my mind, this particular Code section is clear and unambiguous. In such an instance, it can be given but one construction. *Ex Parte Bozeman*, 183 Ala. 91, 63 So. 201, denying certiorari *Bozeman v. State*, 7 Ala. App. 151, 61 So. 604.

Answer to your first question (a) is therefore that the water works board as constituted on January 6, 1948, was abolished by the change in the form of the city government.

In question (b) you ask if the water works board members appointed on January 6, 1948, are lawfully in possession of their offices. As noted immediately above in reference to the answer directed to your question (a), the establishment of a city board of commissioners tends to abolish all other boards except the city board of education. Therefore, the previously existing water works board would be abolished at such time and the terms of office of the officials of the water works board would in like manner cease. The continued function of the old water works

board could only be as a defacto board, and your question (b) is therefore answered in the negative.

In reaching this conclusion, particular consideration has been given to the proviso contained in Title 37, Section 50, Code of Alabama 1940, which reads in pertinent part as follows:

"Provided, however, that all salaried officials **except members of the boards and commissioners above mentioned**, and the recorder if any who are holding office at the time of the adoption of such form of government under an election, appointment, or other selections for a definite term, shall be permitted to serve out such term in the position and with the duties and compensation, and subject to the conditions, restrictions and regulations, which would have existed had there been no change in the government of such city." (Emphasis supplied.)

The phraseology "except members of the boards and commissioners above mentioned, * *," contained in that part of Section 50 quoted above, is, in my opinion, clearly directed to the members of those boards mentioned in Section 45 immediately preceding. As stated, this would include the members of the previously existing water works board, and answer to question (b) would remain in the negative.

Based on the assumption of a negative answer to question (b), as has been given, you ask in question (c) if the board of commissioners has the authority to appoint new directors for the water works board. A clear basis of an affirmative answer is, in my opinion, found in the first part of Section 50, *supra*, which is quoted as follows:

"Every city adopting the form of government provided for by this article shall be governed and managed by the board of commissioners provided for herein. Each and every officer and employee of said city other than the commissioners shall be selected and employed by the said board, or under its direction, and all salaries and wages paid by said city, except as otherwise provided by the terms of this article shall be fixed by said board. The commissioners shall have the authority to create all necessary offices and shall prescribe and may at any time change the power, duties and titles of all subordinate officers and employees of said city including the office of city recorder and all such officers and employees shall hold office and be removable at the pleasure of the board of commissioners.
* * *"

Answer to your question (c) is therefore in the affirmative.

In your question (d) you ask whether or not the board of commissioners has the power to remove from office for cause a member of the water works board. Noting the last portion of the statutory phraseology

quoted immediately above, i. e., "and all such officers and employees shall hold office and be removable at the pleasure of the board of commissioners," it is my opinion that a member of the water works board may not only be removed for cause, but said member may also be removed for any reason at the pleasure of the board of commissioners.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 13, 1949.

Hon. Ed Leight McMillan,
Chairman, State Personnel Board,
CAPITOL.

State and State Departments—Officers and Offices—Attorney General—Merit System.

1. Only those attorneys or lawyers in the State Service who are assistant attorneys general, and who are under bond and are commissioned as such, are within the purview of Act No. 475, S. 572, General Acts 1949, approved August 26, 1949.

2. Act No. 475, supra, does not affect the duty of the State Personnel Board in fixing salary ranges for assistant attorneys general, in any way, except that said board, in fixing salary ranges for assistant attorneys general, may set the maximum of such ranges at seventy-five hundred dollars per year instead of at fifty-seven hundred dollars per year.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of September 9, 1949, is as follows:

"Reference is made to a recent Act by the Legislature pertaining to salaries of Assistant Attorneys General in the Alabama State service. Your official opinion is requested on the following points:

"1. What positions in the State service that are presently classified as Attorneys are affected by this law?

"2. What is the duty of the Personnel Board in giving effect to the provision of this law relative to changes in salary ranges?"

The act to which you refer is Act No. 475, S. 572, General Acts 1949, approved August 26, 1949, and effective immediately.

This act imposed extra, new, and additional duties upon the Attorney General of Alabama and assistant attorneys general of Alabama; provided additional compensation to the Attorney General of Alabama for the performance of said extra, new, and additional duties; and provided that the assistant attorneys general of Alabama be paid such additional compensation for the performance of such extra, new, and additional duties "as may be determined by the State Personnel Board in accordance with the provisions of the State Merit System Law, but the total compensation of any assistant attorney general, including the additional compensation herein provided for, shall not exceed seventy-five hundred dollars (\$7500.00) per year."

The passage of such an act, to be effective immediately, was within the constitutional power of the legislature. *Taylor v. Davis*, 212 Ala. 282, 102 So. 433.

According to your presently effective pay plan, you have Merit System classifications of Attorney, Senior Attorney, Principal Attorney, and Chief Attorney which cover the various attorneys or lawyers in the State Service. Act No. 475, *supra*, deals only with the Attorney General of Alabama and assistant attorneys general of Alabama. No attorney or lawyer in the State Service, other than the Attorney General of Alabama and assistant attorneys general of Alabama, is within the purview of said act.

Title 55, Chapter 5, Article 5, Sections 228-244, Code of Alabama 1940, as amended, are the statutory provisions dealing generally with the Department of the Attorney General and the appointment of assistant attorneys general. Other statutes dealing with the appointment of assistant attorneys general are Title 51, Sections 119-124, Code of Alabama 1940, as amended, dealing with the legal counsel and assistant legal counsel for the Department of Revenue, which provide that such counsel shall have the authority and duties of assistant attorneys general, shall be commissioned as assistant attorneys general, and shall take the oath required of assistant attorneys general.

All assistant attorneys general, including the assistant attorneys general who are legal counsel and assistant legal counsel for the Department of Revenue, are required to give bond as such (Title 41, Section 115, Code of Alabama 1940, as amended); and are commissioned as such.

Specifically answering your first inquiry, you are advised that only those attorneys or lawyers in the State Service who are assistant attorneys general, and who are under bond and are commissioned as such, are affected by the provisions of Act No. 475, *supra*.

As you know, Title 41, Section 152, Code of Alabama 1940, fixes a maximum salary limitation of fifty-seven hundred dollars per annum on officers and employees of the State of Alabama, unless a different maximum is fixed by law.

Act No. 475, supra, and particularly Section 4 thereof, raises this maximum salary limitation, insofar as assistant attorneys general are concerned, from fifty-seven hundred dollars per year to seventy-five hundred dollars per year, thus taking assistant attorneys general without the purview of Section 152, supra. That is the only effect of Act No. 475, supra, on assistant attorneys general. The authority of the State Personnel Board over assistant attorneys general, as set forth in Title 55, Chapter 9, Sections 293-327, Code of Alabama 1940, as amended, is not affected in any manner by the provisions of said act.

Specifically answering your second inquiry, you are advised that the State Personnel Board has the same duty relative to salary ranges for assistant attorneys general which it had before the passage of said act, except that, under said act, your board, in fixing salary ranges for assistant attorneys general, may set the maximum of such ranges at seventy-five hundred dollars per year instead of at fifty-seven hundred dollars per year.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 13, 1949.

Hon. R. P. McRee,
Administrator,

Alabama Alcoholic Beverage Control Board,
CAPITOL.

Alabama Alcoholic Beverage Control Act — Intoxicating
Liquors—Advertisements and Advertising.

Since the term "billboard," as used in Title 29, Section 12, Code of Alabama 1940, signifies merely a flat surface upon which advertising matter is placed, malt and brewed beverages lawfully may be advertised by means of a screen and "projectograph."

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of August 19, 1949, is as follows:

"On July 29, 1937, your office rendered an opinion as to what constitutes a billboard as used in Section 12, Title 29, Code of Alabama 1940.

"We have had several inquiries relative to advertising beer by project-o-graphs. This type of advertising is by use of a projector which flashes advertising matter on a flat screen 10 by 10, and changes such advertising matters every five seconds. There are thirty ads used at each location.

"It will be appreciated if you will advise us as soon as possible whether or not the advertising mentioned in the above paragraph would be classified as advertising by means of billboards."

I am of the opinion that your inquiry should be answered in the affirmative.

The sense in which the term "billboard" is used in Title 29, Section 12, Code of Alabama 1940, is fully discussed in my opinion rendered the Alabama Alcoholic Beverage Control Board on July 29, 1937, found in quarterly Report of the Attorney General, Vol. 8, page 48. I there held that the term "billboard," as used in Section 12, supra, does not mean a structure of any particular size, but merely means a structure with a flat surface, annexed to the land, which has been erected for the purpose of placing thereon advertising matter.

It was further held that the advertising matter placed on such a structure may be placed thereon by posting, pasting or painting; and that the advertising matter so placed thereon may consist of bills, posters, glass, electrical or neon material or of material of like kind and character, or of a combination of one or more of such materials.

Thus, it is seen that the character of the structure as a billboard is not determined by the precise method used in affixing the advertising matter thereon. It follows that the advertisements may be placed directly thereon or may be reflected therefrom. I am, therefore, of the opinion that a screen such as you describe, upon which are projected advertisements of malt and brewed beverages by means of a "project-o-graph," is a "billboard" within the meaning of Section 12, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 13, 1949.

Hon. R. P. McRee, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery 2, Alabama.

Alabama Alcoholic Beverage Control Board—Intoxicating
Liquors.

1. Under facts stated, Alabama Alcoholic Beverage Control Board has no control over Liquor Gift Service plan of sale and delivery of gifts of liquor where order is placed with an Alabama representative of the organization but actual sale and delivery is consummated in another state.

2. Under facts stated, plan of Liquor Gift Service for sale and delivery of gifts of liquor within the State of Alabama is prohibited by law, and the Alabama Alcoholic Beverage Control Board is without authority to promulgate rules and regulations approving such a type service of sale and delivery.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of July 29, 1949, is as follows:

"Attached hereto you will find copy of letter addressed to Mr. Frank Bunkley from the Liquor Gift Service, New Orleans, Louisiana.

"It will be greatly appreciated if you will advise us as soon as possible whether or not the service outlined in the Liquor Gift Service's letter would be legal under the provisions of our State liquor law.

"In the event you rule that such a service would be legal, please advise whether or not the Board would have authority to promulgate rules and regulations either approving or prohibiting such service."

You have accompanied your letter of request for an official opinion with a copy of a letter from the Liquor Gift Service of New Orleans, Louisiana, which outlines that organization's plan of operation.

The first phase of the plan so noted involves only placement of orders for gifts of liquor with an Alabama representative of the Liquor Gift Service organization for purchase and delivery in another state. Since both purchase and delivery is in another state, it is considered unnecessary to set forth the details of such a plan, and you are herewith advised that it is my opinion that this phase of the plan is in no way related to or controlled by our existing Alabama laws.

The second phase of the Liquor Gift Service plan is different in scope and for that reason the pertinent portion of the plan is quoted and set forth as follows:

"We also wish to afford residents of Alabama a means of receiving gifts of liquor from parties outside of the State. In this connection we propose to have our representatives without the State, who may receive orders for the delivery of liquor to an Alabama resident, send such orders to a designated representative within the State, who would purchase the liquor from a state operated store, in accordance with the provisions of your statute and regulations, and cause the liquor to be delivered to the recipient of the gift. This representative would not receive any compensation whatsoever from the recipient. No deliveries would be made to parties residing in dry counties. The purchase of the liquor would take place in a State Store in accordance with the laws and regulations of Alabama, and there would be no sale or transfer for a consideration thereafter. We would like to be in a position to collect from the donor, who places the order outside of the State, a charge for the service to be rendered by our representative in Alabama in making the purchase and delivery but do not know if this would be permissible under your regulations. This charge would be solely to recompense our representative for his trouble in making the delivery to the recipient of the gift."

Upon consideration of this part of the plan as thus outlined, it is apparent that other factors must be dealt with first, which, in my opinion, preclude the legality of such a phase of the plan under our currently existing laws.

The stated purpose of our Alabama Alcoholic Beverage Control Board enactments is to place and keep control of all liquor and alcoholic beverages in the hands of the board, who, in turn, must follow the outlined mandates of the State Legislature. In this regard, Title 29, Section 2, Subparagraph (b), Code of Alabama 1940, reads in pertinent part as follows:

"(b) Except as herein otherwise expressly provided, the purpose of this chapter is to prohibit transactions in liquor and alcohol, and malt or brewed beverages, which take place wholly within the state, except by and under the control of the board, as herein specifically provided, and every section and provision of this chapter shall be construed accordingly. * *" (Emphasis supplied.)

It is further noted that Title 29, Section 5, Code of Alabama 1940, lists under the functions, duties, and powers of the board the following:

"To control the possession, sale, transportation and delivery of alcoholic beverages as enumerated and defined herein."

Following the above expressions of the Legislature is a detailed analysis of the board's authority and state-wide plan of operation for possession, sale, transportation, and delivery of alcoholic beverages. Directly related to the problem herein dealt with is the matter of the issuance of liquor licenses or permits for the sale of alcoholic beverages.

"Sale" is defined at Title 29, Section 1, Subparagraph (p), Code of Alabama 1940, in part as follows:

"'Sale' or 'Sell,' shall include any transfer of liquor, or malt or brewed beverages for a consideration * **"

Thereafter outlined in our Code are certain provisions relating to the method of sale and delivery through the medium of State liquor stores. Issuance of licenses and permits for the sale of alcoholic beverages is also authorized in the case of hotels, restaurants, clubs, and public service companies (such as railroad and steamship lines) under specified conditions. In addition, licenses are issued to manufacturers and distributors or wholesalers. The distributor's or wholesaler's license authorizes sale and delivery within the State of Alabama but only insofar as malt or brewed beverages in sealed containers are concerned. Title 29, Section 24, Code of Alabama 1940.

The concluding paragraph of Title 29, Section 24, Code of Alabama 1940, cited *supra*, reads as follows:

"All other alcoholic beverages must be manufactured, imported, sold or distributed by the board through the state liquor stores in the manner prescribed in this chapter." (Emphasis supplied.)

From the above, it appears conclusive that our State Legislature has evidenced an intent that sale, delivery, and distribution be completely controlled in the specific manner outlined. It is true that the board has authority to promulgate rules and regulations under Title 29, Section 8, Code of Alabama 1940, but specific expression is made that said rules and regulations shall be made when consistent with and necessary to carry out the provisions of the existing statutes.

Since the Legislature has seen fit to clearly outline the desired method of sale, distribution, and delivery, which outline contains nothing to which such a plan as here considered might be related, it is my opinion that said plan cannot lawfully be operated in consistence with our existing Alabama statutes. It is my further opinion that the board may thus promulgate any rules and regulations desired directed to the illegality of such an operation and prohibiting such a service. So considered, the board obviously has no authority to promulgate rules and regulations approving such service and you are so advised.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 17, 1949.

Hon. Weaver Fuqua, Jr.
Tax Collector,
Lauderdale County,
Florence, Alabama.

Taxation—Ad Valorem Taxes—Corporations.

Shareholders are liable for ad valorem taxes on shares of stock of insolvent domestic corporations. Title 51, Section 25, Code of Alabama 1940.

Opinion by Assistant Attorneys General Culverhouse and Nachman.

Dear Sir:

Your request for an official opinion, bearing date of April 27, 1949, is as follows:

"There are two corporations, organized under the laws of the State of Alabama, as I understand it, each of whose principal place of business is in Lauderdale County and against each of whom ad valorem taxes have been assessed by the State Department of Revenue.

"According to my information, each of these corporations is insolvent, and neither of them has any assets whatsoever."

"Please advise me if the individual stockholders in these corporations are liable for the taxes assessed against them."

I am of the opinion that individual stockholders of insolvent corporations are liable for ad valorem taxes assessed in accordance with Title 51, Section 25, et seq., Code of Alabama 1940.

Section 25, *supra*, provides that ad valorem taxes are levied on the shares of stock of any domestic corporation against the person in whose name such shares stand on the books of the corporation. Without more, the tax does not go against the corporation. This means that the individual shareholder is primarily liable for ad valorem taxes assessed against the share of stock which he holds in a domestic corporation. There are certain exceptions to the primary liability of the shareholder. If the corporation fails to file the list showing the total number of shares of stock in the corporation, the par value thereof, the full name and residence of each shareholder, and other data required by Section 25, the corporation itself then become primarily liable for the tax. *Brantley v. Kelly*, 226 Ala. 47, 145 So. 649. Also, a corporation may agree to pay the taxes assessed on the shares for the shareholder. Title 51, Section 28,

Code of Alabama 1940. In all cases, however, even though the corporation by agreement or inaction may have become primarily liable for the Section 25 tax, the shareholder remains secondarily liable in the event that the corporation fails to pay the tax for the shareholder.

Therefore, in view of the express provisions of Section 25, *supra*, it is my conclusion that individual shareholders of insolvent domestic corporations are liable for the ad valorem taxes assessed in accordance with the provisions of Title 51, Section 25, Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 19, 1949.

Hon. Ward W. McFarland,
Director,
State Highway Department,
CAPITOL.

Motor Vehicles—Highways and Highway Department—Automobiles.

The Safe-T-Scope light designed for use on the 1949 Ford automobile, being an auxiliary driving light and not a third headlight, is legal equipment in this State under Title 36, Section 41(b), Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of January 25, 1949, is as follows:

"Under Title 36, Chapter 1, Section 44, Paragraph (a), it is made the duty of the Highway Director to approve all electric lights, etc., used on motor vehicles in the State of Alabama.

"Under Section 40, Paragraph (b), of the Alabama Code, 'it is provided that every motor vehicle, etc., must be equipped with two head lamps, no more and no less, at the front of and on opposite sides of the motor vehicles, etc.,'

"Section 41, of same Title and Chapter Paragraph (b), 'provides for auxiliary driving lights on motor vehicles.'

"I have had several requests for the approval of lights which in my opinion are extra head lights which I have declined to approve for use on motor vehicles in this State.

"The car for which these lamps are intended for is the new model Ford.

"One of the manufacturers of this light has taken exception to my ruling, stating we have approved fog lamps of other manufacturers. This is true but our approval was under the section authorizing auxiliary driving lights and it is my opinion that a fog light is an auxiliary driving light and is supposed to be used only during adverse weather conditions and not to be used as a head light.

"The name of the light in question is Safe-T-Scope, manufactured by the Safe-T-Scope Company of Ferndale, Michigan. This light in other states is mounted in the center of the grill of the Ford Car and operates in conjunction with two driving lamps one on either side of the radiator and I have ruled that this is a third head light to which the manufacturer takes exception.

"As set out in his letter to our Mr. F. O. McManus, Secretary, of this Department a copy of which I am attaching hereto.

"I will thank you for your opinion as to whether a light used on the front of motor vehicles in conjunction with two other driving lights would be classified as a third head light or an auxiliary driving light.

"The Ford car in Alabama and in other states which have similar law has an ornamental cover for the opening in the grill for this third light which I presume you have noticed."

Your question is one of first impression in this office and has not been passed on by the courts of this state. Nor am I able to find that it has been decided elsewhere. The 1949 Model Ford automobile has been on the market only a few months and the light in question was designed especially for use on that make and model motor vehicle.

From Title 36, Section 42, Code of Alabama 1940, it will be noted that headlamps by statutory definition are lamps which "render clearly discernible a person two hundred feet ahead." From the specifications of the Safe-T-Scope light, it is noted that it "covers the road from about 20 feet to about 40 feet ahead of the car." This state does not regulate headlight usage on the basis of light output.

Obviously the Safe-T-Scope light was neither designed nor intended to operate as a third headlight, nor to supplement the normal function

of headlights. Regulatory bodies of New York, Michigan and Oregon have classified this light as an auxiliary driving light. According to specifications, it is calculated to answer a special need by "looking around corners" and thus eliminate blind spots, turning one-third farther and faster than the vehicle's wheels. In straightaway travel the light is calculated to fill the hazy spot directly in front of the car and to accentuate the center line and right edge of the pavement. Its construction and electrical connections are such that it can be illuminated only when the headlights are burning, although it can be turned off independent of the headlights. The light is mounted 24½ inches above the ground and is not on a level with the center line of the two headlights. No part of the beam is directed to the left of the center of the highway, and the light's vertical target setting precludes the possibility of vision interference with oncoming traffic since its rays are below those of the low beam on headlights. The light utilizes the GE No. 4012 sealed beam fog lamp unit with a clear lens. As between individual owners, sharp difference of opinion might arise concerning the extent to which the light contributes to safety and convenience of motor vehicle operation. That question, however, addresses itself to individual preference and experience.

I am of the opinion, therefore, that the Safe-T-Scope light is not a third headlamp, but comes within the definition of an auxiliary driving lamp, as defined by Title 36, Section 41, (b), Code of Alabama 1940.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 21, 1949.

Hon. Garnett Stancil, Mayor,
Town of Centreville,
Bibb County,
Centreville, Alabama.

Officers and Offices—Municipalities—Notices.

1. An alderman may not lawfully sell goods, wares or merchandise to a town which he serves as alderman.
2. Aldermen do not violate the law if they contract for the city with a corporation in which they own stock or hold official positions.
3. Legal notices may be published by a town in a newspaper which is owned by one of its aldermen if no other paper is available in the county.

Opinion by Assistant Attorney General Parker.

Dear Sir:

Your request for an official opinion, bearing date of August 8, 1949, is as follows:

"Just received copies of your rulings thru March 1949. I note where you ruled for the municipality of Town Creek, Alabama, as follows: Title 37 section 452 1940 Code of Alabama: 'And any Mayor or Alderman who has any private or financial dealings, or shall render any service, or supply any commodity etc., for compensation, payable out of city funds, shall be subject to impeachment etc.'

"Now what I want to know is as follows:

"1. Does above section prohibit the Town from buying gasoline from the three service stations in town that are owned by different Aldermen?

"2. One Alderman that owns a motor company, has offered to sell us a 2 ton chasis at cost for our Fire truck that we are purchasing new, could he legally do this in view of above ruling.

"3. Our only County newspaper is owned by a member of the Council, does that prohibit him from doing city job printing and publishing legal notices.

"In other words if it is unlawful for this newspaper to do our printing because owner is a member of the council, we could not comply with the law that requires publication of some things, merely because of above ownership, as it appears to me. Therefore we would like a ruling in detail as to our particular case. If we cannot buy the truck chasis at cost from one dealer because he is a member of the council—chances are we will have to pay regular retail from some of the others, as he made this offer in order to help the city. So please advise at your earliest as we are holding everything pending a ruling from you as to above."

The answers to your questions involve a consideration of Title 37, Sections 414 and 452, and Title 41, Section 221, Code of Alabama 1940.

Title 37, Section 452, reads, in pertinent part, as follows:

"§ 452. Mayor and aldermen accepting employment from public service corporation vacates office.— * * * * And any mayor or alderman, or other member of the governing body of any municipality who shall have any private or personal financial dealings with, for or on account of the municipality, except such as are imposed by

his official position, or who shall render any service or do any work or supply any commodity, for financial compensation, payable out of the funds of the municipality, shall be guilty of a misdemeanor, and the doing of such act shall constitute grounds for impeachment of such person."

Title 37, Section 414, reads as follows:

"§ 414. Aldermen, etc., not to be interested in municipal contracts or business thereof.—No alderman or officer or employee of the municipality shall be directly or indirectly interested in any work, business, or contract, the expense, price, or consideration of which is paid from the treasury, nor shall any member of the council, or officer of the municipality be surety for any person having a contract, work, or business with such municipality, for the performance of which a surety may be required."

Title 41, Section 221, Code of Alabama 1940, reads, in pertinent part, as follows:

"§ 221. Misconduct of public officer.—Every public officer who shall: * * * * 2. Be beneficially interested, directly or indirectly, in any contract, sale, lease, or purchase which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward from any other person beneficially interested therein; or

* * * * *

Shall be fined not more than one thousand dollars and may be sentenced to hard labor for the county for not more than six months, and any contract, lease, sale, or purchase mentioned in subdivision 2 hereof shall be void."

In answer to your question No. 1, it is my opinion in light of the statutes quoted, supra, that the town would not be able to buy gasoline from service stations owned by city officials. Aldermen cannot lawfully sell goods, wares or merchandise to the town which they serve as aldermen. Quarterly Report of Attorney General, Vol. 21, page 154; Quarterly Report of Attorney General, Vol. 34, page 22.

However, this would not prevent the city from dealing with incorporated firms, who number among their stockholders or officers, members of the city government. This office has held that a similar statute (Title 41, Section 211, Code of Alabama 1940) involving county offices does not prevent contracts between the county and an incorporated business whose stockholders or officials are members of the county governing body. Quarterly Report of Attorney General, Vol. 16, page 65; Quarterly Report of Attorney General, Vol. 17, page 6; Quarterly Report of Attorney General, Vol. 19, page 236. I am of the opinion that the

reasoning of these opinions apply with equal force to members of the city government and to the statutes, *supra*.

A careful consideration of the statutes noted, *supra*, leads me to the conclusion that the purpose of the Legislature was to prohibit entirely participation by aldermen in city contracts. Therefore, the prohibition would include all contracts regardless of whether the city officials furnished goods or services at a profit or loss or at cost. The answer to question No. 2 is in the negative.

In reply to your third question, I am of the opinion that for the reason cited, *supra*, the county newspaper could not do job of printing for the city unless it were incorporated.

The question of the publication of legal notices presents a problem of apparent conflict between the statutes that require legal notices to be published by the city in a county or city newspaper and the statutes quoted, *supra*. It is my opinion that the Legislature had this possibility in mind when it provided the qualifying phrase "except as are imposed by his official position" in Section 452, *supra*. It is my conclusion that the publication of legal notices is a duty "imposed by his official position" under the facts stated by you. Thus, the publication in the only newspaper in the county would be an act within the excepting phrase and, therefore, legal regardless of the ownership of the newspaper.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 21, 1949.

Hon. Bankhead Bates,
Director of Public Safety,
P. O. Box 1471,
Montgomery 2, Alabama.

Motor Vehicles—Drivers' Licenses—Department of Public
Safety—Alabama Motor Vehicle Responsibility Act—Arrests—
Warrants.

1. Proof of ability to respond in damages must be furnished by a person convicted for offense of driving without a driver's license, or driving a motor vehicle that is unregistered.

2. If a person who is required to surrender his driving license, registration certificate, and registration plate refuses to do so voluntarily and on request of the director, he should be arrested after issuance of a warrant for willful failure to return to the director such license, registration certificate, and regis-

tration plate. A peace officer should not use force to obtain said license, registration certificate, and registration plate, but may use necessary force to effect arrest for refusal. A court may order a return of license, registration certificate, and registration plate.

3. After three years of nonownership and nonoperation of motor vehicle, director may waive filing proof of ability to respond in damages.

4. A person is required to file proof of ability to respond in damages on all vehicles registered in his name. Upon bona fide sale of all but one vehicle, proof of ability need be filed on only one remaining vehicle.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of May 3, 1949, is as follows:

"It will be greatly appreciated if you will advise me on the following:

"1. Whether the provisions of Act No. 276, Section 3(b), General Acts 1947, make it mandatory upon the Director of Public Safety to require a person convicted of driving without a driver's license or driving a motor vehicle without a registration plate to file proof of ability to respond in damage for any liability thereafter incurred, resulting from the ownership, maintenance, use or operation thereafter of a motor vehicle, for bodily injury to or death of any one person in the amount of at least \$5,000.00, and subject to the aforesaid limit for any one person injured or killed, of at least \$10,000.00 for bodily injury to or death of two or more persons in any one accident, and for damage to property in the amount of at least \$1,000.00 resulting from any one accident, before a motor vehicle could be registered in his name or a driver's license be issued to him?

"2. Where the Director has suspended or revoked the driver's license, certificate of registration, or number plate under this law or any other Alabama law, would the sheriff or other official having police authority when directed by the Director to secure driver's license, certificate of registration or number plates and the person refuses to surrender same, should these licenses and plates be secured by force or will the officers be considered as having carried out their duties when they make an arrest for this refusal? Will this arrest require a warrant, if so, should this warrant be secured before or after such an arrest?

"3. Under Section 12 of this Act when a person has had his driver's license and or registration plates suspended and surrenders both to the Director and does not own or operate a motor vehicle during a period of three years, but does not file proof of financial responsibility as required by this Act be required to file said proof after the lapse of this three year period before a driver's license or registration plate could be issued to him?

"4. When a person owns two or more motor vehicles and his driver's license or registration plates have been suspended by the Director for violation of this Act or any other act requiring such action, can the person surrender his driver's license and all registration plates except one and file proof of financial responsibility as required under this Act on the one remaining vehicle or would he be required to either surrender all license plates or file proof of financial responsibility on all vehicles owned by him whether he intends to operate same or not. Could the owner in a situation of this kind sell all motor vehicles except one and file proof of financial responsibility on the one remaining vehicle?"

I shall answer your inquiries in the order in which they appear in your request for an official opinion.

Act No. 276, General Acts 1947, page 121, approved August 6, 1947, is found in the 1947 Cumulative Pocket Part, Code of Alabama 1940, as Title 36, Sections 74(1), et seq. This Act is known as the Alabama Motor Vehicle Responsibility Act, and, stated in its simplest terms, requires the Director of Public Safety to suspend the driver's license or chauffeur's license, and registration certificate of any person who has been convicted of certain driving offenses. The Act further requires the suspension of the operator's or chauffeur's license, and the registration certificate when a judgment has been obtained against the operator of a motor vehicle for damages to persons or property, and that judgment remains unsatisfied.

In order to become privileged to drive an automobile again, the person must pay the unsatisfied judgment, and put up security in the way of an insurance policy or otherwise in order to be re-licensed. The same is true of those who are convicted of certain offenses. They must also file certain security to indemnify persons injured in the future by reason of their operation of motor vehicles.

Your first question concerns the duty of the director in suspending a driver's license and license plates when a person is convicted of certain offenses. As used in this opinion, the phrase "driving privilege" is meant to include the operator's or chauffeur's license required by Title 36, Sections 59, et seq. Code of Alabama 1940; also the registration certificate issued by the probate judge upon payment of the license on motor vehicles (Title 51, Sections 692, et seq., Code of Alabama 1940), and the metal license plates.

1. In my opinion, it is mandatory upon the Director of Public Safety to require a person convicted of driving without a driver's license, or driving a motor vehicle without a registration plate (when said motor vehicle is unregistered) to file proof of ability to respond in damages as required by Section 3(b) of the Act here discussed. Section 3 of Act No. 276, supra, provides as follows:

"Section 3. (a) (Suspension of Operator's License and Registration Certificate for Certain Offenses.) The motor vehicle operator's license, chauffeur's license, and all registration certificates of any person shall be suspended forthwith without notice or hearing by the director whenever such person shall by a final order or judgment have been convicted of or shall have forfeited any bail or collateral deposited to secure his appearance for trial as defendant (where such forfeiture shall not have been vacated) for any offense hereafter committed which requires suspension or revocation of the licenses of such person in this state, or for any offense in any other state which, if committed in this state, would require suspension or revocation of the licenses of such person in this state.

"(b) (Proof of ability to Respond in Damages Condition Precedent to Future Licensing or Registration.) Such operator's license, chauffeur's license and registration certificates shall remain suspended and shall not at any time thereafter be renewed, nor shall any such license be thereafter issued to such person (including any such person not previously licensed who shall by final order or judgment have been convicted of, or forfeited any bail or collateral deposited to secure his appearance for trial (where such forfeiture shall not have been vacated), for any such offense or for operating a motor vehicle upon the highways without being licensed to do so, or for operating an unregistered motor vehicle upon the highways, and any person whose driver's or operator's license shall have been suspended or revoked by the director under existing laws with or without preliminary hearing) nor shall any motor vehicle be thereafter registered in the name of any such person until he shall have given proof of his ability to respond in damages for any liability thereafter incurred, resulting from the ownership, maintenance, use or operation thereafter of a motor vehicle, for bodily injury to or death of any one person in the amount of at least \$5,000.00 and subject to the aforesaid limit for any one person injured or killed, of at least \$10,000.00 for bodily injury to or death of two or more persons in any one accident, and for damage to property in the amount of at least \$1,000.00 resulting from any one accident. Such proof in such amounts shall be furnished for each motor vehicle registered by such person."

It is clear from the above-quoted parts of Section 3 of Act No. 276, supra, that the director must not only require proof of ability to respond in damages from those persons (1) who have been convicted for an offense which requires revocation of driving license (See Title 36, Section

68, Code of Alabama 1940); but the class of persons who must be required by the director to file proof of ability to respond in damages also includes (2) persons not previously having a driver's license who have been convicted for operating a vehicle without a driver's license. Section 3(b), *supra*. A third class of persons who must be required to file proof of ability to respond in damages is the (3) class of persons who have been convicted for operating an unregistered motor vehicle. It should be added here that before a person should be required to file proof of ability to respond in damages as a member of class 3, *supra*, the mere fact that there is no metal tag on the vehicle would not be conclusive that the vehicle has not been registered. In other words, the vehicle may be registered and may be driven without a tag. Although this may be an offense (Title 36, Section 75, Code of Alabama 1940), it is not sufficient to require the filing of proof of ability to respond in damages. It is only the offense of driving an unregistered vehicle whether the metal tag is on the vehicle or not that requires the filing of proof of ability to respond (Section 3(b) of Act No. 276, *supra*). I have added this explanation, for the reason that your inquiry number 1 is directed to the metal license plate, rather than the fact of registration which would appear on the records of the probate judge. (See Title 51, Section 705, Code of Alabama 1940.) Of course, if a vehicle has no metal tag, it should probably be investigated to learn whether or not the vehicle is registered or unregistered.

A fourth class of persons who must be required to file proof of ability to respond in damages is the class whose driver's license has been suspended or revoked by the Director of Public Safety. See Title 36, Section 68, Code of Alabama 1940.

2. In my opinion, a sheriff or other police officer should not forcibly take a driver's license, certificate of registration, or license plate from a person who has had these privileges revoked or suspended by the Director of Public Safety. At least two laws require that the director secure the driving license of a person whose license has been suspended or revoked. See Title 36, Section 68, Code of Alabama 1940, which provides in part as follows:

"The director of public safety upon suspending or revoking any license shall require that such license shall be surrendered to and be retained by the director of public safety except that at the end of the period of suspension such license so surrendered shall be returned to the licensee. If such licensee refuses to surrender such license, he shall be guilty of a misdemeanor and, upon conviction, shall be punished in the manner hereinafter provided"

Further, Act No. 276, *supra*, requires the director to cause the operator's or chauffeur's license, the certificate of registration, and the number plates to be returned to the Department of Public Safety, if the person required to file proof of ability to respond in damages fails to do so. Section 11 of Act No. 276, *supra*, provides:

"Section 11. (License, Registration Certificate and Number Plates to be Returned to Director.) Any operator or any owner, whose operator's or chauffeur's license or certificate of registration shall have been suspended as herein provided, or whose policy of insurance or surety bond when the same is required under this act, shall have been cancelled or terminated, or who shall neglect to furnish other evidence of ability to respond in damages upon request of the director shall immediately return to the director his operator's or chauffeur's license, certificate of registration and the number plates issued thereunder. If any person shall wilfully fail to return to the director the operator's or chauffeur's license, certificate or certificates of registration or the number plates issued thereunder as provided herein, the director shall forthwith direct any sheriff or other official having police authority to secure possession thereof and to return the same to the office of the director. Any person wilfully failing to return such operator's or chauffeur's license or such certificate or certificates or number plates shall be guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars, and in addition thereto may be imprisoned in the county jail for not to exceed thirty days, and such penalty shall be in addition to any other penalty imposed for any violation of the motor vehicle laws of this state."

The procedure to be followed, therefore, is clear. Upon suspending or revoking a license under the provisions of Title 36, Section 68, Code of Alabama 1940, or upon failure of a person to file proof of ability to respond in damages, the director should request the sheriff or some police officer to secure the driving license if that person has not already done so after a request by the director. If the person refuses to deliver to the officer his driving license, his registration certificate, and the metal license plate, then a warrant should be obtained, and the person should be arrested for such refusal. Of course, the officer could use the force that is necessary to cause the person to be brought before a magistrate, pursuant to a warrant of arrest, but should not forcibly take the license plate, the driver's license, or certificate of registration. The warrant of arrest should be obtained before arresting such person. Upon being carried before a magistrate or court, such court could issue the necessary orders to obtain these articles, the driver's license, the certificate of registration, and the number plates, if necessary, by the issuance of a search warrant. See Title 15, Sections 99, et seq., Code of Alabama 1940.

3. In my opinion, after the lapse of three years from the time the director requests a person to file proof of ability to respond in damages, a new license may be issued, and a vehicle may be registered in the name of such person, without filing proof of ability to respond in damages even though no such proof has never been filed. Section 3 (a) and (b) and Section 4 (a) and (b) of Act No. 276, supra, state in substance that the operator's license and registration certificate shall remain suspended until proof of ability is filed. However, Section 12 of Act No. 276, supra, provides in part as follows:

"Section 12. (Period During Which Proof of Ability to Respond in Damages Must Be Maintained; When Proof Returned.) The director shall upon request cancel any bond or return any certificate of insurance, or the director shall direct and the state treasurer shall return to the person entitled thereto any money or securities deposited pursuant to this act as proof of ability to respond in damages, or waive the requirement of filing proof of ability to respond in damages in any of the following events:

"(a) (After Three Years if no Conviction Under Section 3.) At any time after three years from the date such proof was required when during the three year period preceding the request the person furnishing such proof has not been convicted of any offense referred to in section 3 of this act, or whose license has not been suspended or revoked by the director with or without preliminary hearing; or" (Emphasis ours.)

It is clear to me from the above that a person required to file proof of ability to respond in damages must maintain such proof for three years. If, during that three years, the person has not been convicted for any of the offenses enumerated in Section 3, supra, and his driver's license has not been suspended or revoked by the director, he is entitled to have his security returned to him. Obviously, if a person does not own or operate an automobile during that time, he could not be convicted of the offenses, and could not have had a license suspended or revoked during that time. After the three-year period, therefore, the director may waive the requirement for filing proof, then a driver's license and registration plate may be issued.

4. In my opinion, when a person owns two or more motor vehicles, and his driver's license and registration plates have been suspended by the director for failure to file proof of ability to respond in damages, it would not be possible for that person to surrender his registration plate and driving license for all vehicles except one and then file proof of ability on the remaining vehicle and be re-licensed and re-registered. The Act requires that proof of ability to respond in damages must be furnished for each motor vehicle. Section 3(b) concludes as follows: "Such proof in such amounts shall be furnished for each motor vehicle registered by such person." Section 4(b) requires that a person give proof of his ability to respond in damages as required by Section 3 above quoted. If the person owns several automobiles, and by reason of Act No. 276 is required to file proof of ability to respond, he must do so on all vehicles registered in his name before he can be relicensed. In my opinion, it makes no difference whether the person intends to operate his surplus vehicles or not. If they are registered in his name, the act requires that he furnish proof in respect to each of them.

Under the same facts, it is my opinion that the person required to file proof of ability could make a bona fide sale of all but one vehicle,

and then furnish proof of ability as to that remaining vehicle, and be properly licensed, and have the vehicle registered in his name. If a bona fide sale is made, the registration is transferred. See Title 51, Section 706, Code of Alabama 1940, as amended by Act No. 361, General Acts 1945, page 578. If he disposes of his surplus automobiles by bona fide sales, that would leave only one registered in his name, and he could comply with Section 3(b), supra, by furnishing proof of ability as to all vehicles registered in his name, which in the latter case would be one vehicle. In this case, I call your attention to Section 13 of Act No. 276, supra, which allows the director to require the transferee to file proof of ability to respond in damages under certain conditions enumerated in that section.

You have also submitted to me two forms proposed to be used to certify to the director that a bona fide sale of a vehicle has taken place and the registration transferred. In my opinion, these forms submitted are sufficient for the purposes of Act No. 276, supra.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 27, 1949.

Hon. P. C. Black,
Judge of Probate,
Geneva County,
Geneva, Alabama.

Tax Assessors—Tax Collectors—Local Legislation—Constitutionality.

1. Act No. 360, H. 378, approved August 9, 1949 (Ms.), authorizes and directs the county governing body of Geneva County to pay the salaries of an additional clerk for the Tax Assessor and the Tax Collector of that County.

2. It is not necessary that the Tax Collector and Tax Assessor jointly appoint and fix the salaries of such clerks.

3. The Tax Assessor and Tax Collector, may in appointing such clerks, fix their compensation on a monthly or annually basis.

4. This Act is constitutional and is not violative of Section 45 of the Constitution of 1901.

5. The word "clerk" as used in said Act is not synonymous with the word "deputy" as used in Title 51, Sections 34 and 190, Code of Alabama 1940.

6. This Act is not amendatory to Sections 34 or 190, *supra*.

7. The Probate Judge is legally authorized to draw warrants for the payments of the salaries of such clerks.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of September 3, 1949, is as follows:

"Attached hereto is an official printed and certified copy of Local Act No. 360, H. 738 to authorize and direct the governing body of Geneva County to pay the salaries of additional clerks for the Tax Assessor and Tax Collector of the County, approved August 9, 1949. Please advise me upon the following questions:

"1. Does this Act as approved legally authorize and direct the governing body of Geneva County to pay the salaries of additional clerks for the Tax Assessor and Tax Collector for Geneva County?

"2. If so, in view of the wording of the Act, will the Tax Collector and Tax Assessor be required to jointly appoint and fix the salaries of each of such clerks as provided in the Act?

"3. Since the Act makes no provision as to how the salaries of such clerks are to be paid, whether monthly or annually, should the county governing body require such clerks or deputies to file claims for their services on a monthly basis before payment?

"4. Does the Act as approved meet the requirements of the Constitution, especially Section 45 thereof?

"5. Chapter 6, Title 51, Section 34, Code of 1940 authorizes Tax Assessors to appoint deputies, but I find no authorization under general law for the appointment of clerks by the Tax Assessor, and this Act provides for the appointment of an additional clerk for the Tax Assessor and an additional clerk for the Tax Collector. Is the word 'Clerk' as used in this Act synonymous with the word 'Deputy'?

"6. Chapter 12, Title 51, Section 190, Code of 1940 authorizes Tax Collectors to appoint deputies; but I find no authority under general law for the appointment of clerks by the Tax Collector, and this Act provides for the appointment of an additional clerk for the Tax Assessor and an additional clerk for the Tax Collector. Is the word 'Clerk' as used in this Act synonymous with the word 'Deputy'?

"7. Is this Act separate and distinct from Section 34, Title 51, and Section 190, Title 51, Code of 1940, or is it in the nature of an

amendment of said sections? If it is construed as an amendment does said Act as approved meet the requirements of the Constitution, especially Section 45 thereof?

"8. Will I, as Probate Judge, be legally authorized to draw warrants for the payment of the salaries of such clerks when fixed by the Tax Assessor and Tax Collector and approved by the County governing body?

"Please let me have your official opinion on these questions as soon as possible."

Before proceeding to a categorical answer to your questions, I deem it advisable to set out in full Act No. 360, H. 738, approved August 9, 1949 (Ms.), which reads as follows:

"Act No. 360

H. 738—Faulk

"An Act

"To authorize and direct the governing body of Geneva County to pay the salaries of additional clerks for the Tax Assessor and Tax Collector of the County.

"Be It Enacted by the Legislature of Alabama:

"Section 1. The governing body of Geneva County is authorized and directed to pay out of the county treasury the salaries of an additional clerk for the Tax Assessor and an additional clerk for the Tax Collector, to be appointed by the Tax Collector and Tax Assessor who shall also fix each of their salaries at not more than one thousand five hundred dollars (\$1500) per annum.

"Section 2. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

"Approved August 9, 1949.

"Time 2:13 P.M."

My answer to your first question is in the affirmative.

Act No. 360, supra, in no uncertain terms authorizes and directs the county governing body of Geneva County to pay the salaries of an additional clerk for the Tax Assessor and Tax Collector of Geneva County.

My answer to your second question is in the negative.

In my opinion the wording of the Act and the legislative intent was that the Tax Assessor of Geneva County would appoint a clerk to aid

him in the performance of his duties as Tax Assessor, and the Tax Collector of Geneva County would appoint a clerk to aid him in his duties as Tax Collector of said county. From a reading of the Act, *supra*, I see no basis for the conclusion that the appointment of such clerks should be the joint acts of the Tax Collector and the Tax Assessor. It is also my opinion that the Act does not require the joint action of these two officials in fixing the salaries of the respective clerks to be appointed under the Act. The Tax Assessor has the authority to fix the compensation of the clerk appointed by him, and the Tax Collector has the authority to fix the compensation of the clerk appointed by him.

In answer to your third question, you are advised that the Tax Assessor and Tax Collector may appoint such clerks and fix their compensation on a monthly basis if they deem this the best method for payment of the compensation of such clerks. It is common knowledge that all of the employees of the several counties in the State of Alabama are paid on a monthly basis, and I see no reason for deviating from this practice under the provisions of this Act. It will not be necessary for such clerks to file claims with the county governing body of your county for their services as their name should appear on the monthly payroll of the county, and their compensation should be paid as other employees of the county are paid. When a claim against the county is fixed by law, it is not necessary that such claim be filed with the county governing body.

In answer to your fourth question, you are advised that in my opinion the Act as approved meets the requirements of the Constitution. The Constitution confers on the Legislature plenary power to legislate except as restricted by either the State or the Federal Constitution. Constitution of Alabama 1901, Section 44; *Ex parte Foshee*, 21 So. 2d 827, 246 Ala. 604. I find no provision where the State or Federal Constitution prohibit the Legislature from providing additional employees in the offices of the county officials. You are, therefore, advised that in my judgment this Act meets the requirements of the Constitution.

You inquire specifically as to whether or not this Act violates the provisions of Section 45 of the Constitution of 1901. This section has to do with what subjects may be contained in an act passed by the Legislature. Among other things, it provides that each law shall contain one subject which shall be clearly expressed in its title. I assume that this is the part of Section 45 which you inquire about in your question No. 4. Act 360, *supra*, has but one subject. That subject being the hiring and paying the salaries of additional employees in certain county offices of your county. This subject is clearly expressed in the title, and the body of the Act does not vary from that subject so expressed.

In answer to your fifth and sixth questions, it is my opinion that the word "clerk," as used in said Act 360, is not synonymous with the word "deputy," as used in Sections 34 and 190 of Title 51, Code of Alabama 1940. This Act is separate and distinct from those two code sections and is not connected with said sections in any way.

In answer to your seventh question, it is my opinion that Act No. 360, supra, is not in any way an amendment to Section 34 or 190 of Title 51, Code of Alabama 1940. This Act purports to be and is a separate and independent Act and is not amendatory of any existing law, either general, special or local.

Since this Act is not an amendment to any code section or any other law, it is not necessary that I answer that part of your seventh question dealing with the constitutionality of this act in this regard.

In answer to your eighth question, you are advised that since this Act was legally passed and approved and is not violative of the provisions of the Constitution of Alabama 1901, you, as Probate Judge of Geneva County, will be legally authorized to draw warrants for the payments of salaries of such clerks when the same have been respectively fixed by the Tax Assessor and Tax Collector of your county.

You ask the same questions in regard to Act No. 345, S. 556, which said act provides an extra clerk for deputy to the sheriff of your county. You may consider the answers to the above questions concerning Act No. 360, supra, as answers to your questions in regard to Act No. 345, as the same legal propositions are equally applicable to both Acts.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 28, 1949.

Hon. John B. Sockwell,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Exemptions—Licenses—Veterans.

1. Qualified veterans are entitled to an exemption not to exceed thirty-five dollars (\$35) from commercial fresh water fishing license for a period of six years.

2. Qualified disabled veterans are entitled to an exemption not to exceed twenty-five dollars (\$25).

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of September 15, 1949, is as follows:

"We are aware of the fact that veterans are not exempt from ordinary hunting and fishing license, however, the question arises as to whether they are exempt from a commercial fresh water fishing license which only applies in the Tennessee River and its reservoirs.

"We would like to have an opinion as promptly as possible as these licenses are due October 1."

Your attention is invited to Act No. 353, General Acts 1945, page 570, as amended by Act No. 698, General Acts 1947, page 535, wherein exemptions from "business or occupational license taxes" not to exceed thirty-five dollars (\$35) are given to certain qualified veterans for a period of six years.

Title 51, Sections 852 to 864, Code of Alabama 1940, as amended by Act No. 564, General Acts 1943, page 562, and Act No. 366, General Acts 1945, page 589, provide for exemptions to disabled veterans not to exceed twenty-five dollars (\$25). There is no limitation of time pertaining to this latter exemption.

It is my opinion that a commercial fresh water fishing license may be considered a "business or occupational" license tax. Therefore, veterans who meet the requirements of the above-cited acts of Alabama are entitled to the exemptions provided therein.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 29, 1949.

Hon. Ward W. McFarland,
State Highway Director,
CAPITOL.

Eminent Domain—Consequential Damages.

Sections 23 and 235, Constitution of Alabama 1901.

The State of Alabama, in the enlargement of its works, highways or improvements, is not responsible for consequential damages suffered by a property owner unless there be a taking of the property of such person within the meaning of Section 23, Constitution of Alabama 1901.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of August 1, 1949, is as follows:

"Some time ago this Department began certain improvement operations on U. S. Highway 78 in the Town of Irondale, Alabama. This highway passes through Irondale as a through street, is a part of the State highway system, and is maintained entirely by the State Highway Department.

"The purpose of the above mentioned operations was to widen the existing pavement in order that the heavy traffic on the route might be better facilitated. In the process of doing this work the existing elevation was lowered about seven feet at a point in front of property owned by a filling station operator. As a result thereof, access to the place of business of this owner has been rendered very difficult. Due to the close proximity of the owner's station and pumps to the right-of-way line, it is the opinion of this Department that the only way in which satisfactory access to this place of business can be attained is for the owner's station and pumps to be moved back and the existing earth graded down to the present level of the highway. This would be an expensive operation.

"The improvements and change in elevation of the above highway occurred entirely within the existing right-of-way. No additional right-of-way was needed or acquired from the owner of the filling station. It is believed that the damages sustained by the property owner are consequential in nature and that this Department is not liable for these damages. In this connection we would like to call to your attention *Finnell v. Pitts*, 222 Ala. 290, 132 So. 2 and *Brock v. Anniston*, 244 Ala. 544, 14 So. (2d) 519.

"Your official opinion as to whether this Department is liable for the damage sustained by the owner of the above mentioned filling station is requested. No damages are alleged by reason of any structural defects caused in the owner's place of business by these operations; the damages claimed are the costs of relocating his business and equipment, and the decline of his business due to the present inaccessibility of his location.

"Since damages of the owner of the filling station due to the loss of business are increasing daily, it is requested that this matter be given your immediate consideration in order that this Department may make a settlement thereof as soon as possible if we are liable."

In my opinion, your inquiry should be answered in the negative.

The pivotal question of the instant inquiry is that of whether the injury or damage suffered by the property owner here concerned has been occasioned by a taking of his private property for state highway purposes, or its application to such use for which just compensation is due under Section 23 of the Constitution of Alabama 1901. If such question be answered in the negative, the State is not liable for any damage incurred by the property owner herein mentioned, this for the

reason that the provisions of Section 235, Constitution of Alabama 1901, providing for the liability of certain corporations for consequential damages are not applicable to the State of Alabama. *Finnell v. Pitts*, 222 Ala. 290, 132 So. 2; *Duy v. Alabama Western Ry. Co.*, 175 Ala. 162, 57 So. 724; *Hunter et al v. City of Mobile*, 244 Ala. 318, 13 So. 2d 656; *Brock et al v. City of Anniston*, 244 Ala. 544, 14 So. 2d 519.

Prior to the adoption of the provisions of Section 235, *supra*, as Section 7, Article 14 of the Constitution of Alabama 1875, the common law rule was to the effect that the state held its highways in trust for the public use. It had the right to improve them or to authorize their improvement through the agency of its municipalities, although such action for the public benefit might result in injury to the private property of the citizen. The prerogative of the state was to exempt itself from such for damages consequential to the injury inflicted, and it was conceived proper, in the light of former experiences, that the same prerogative should be extended to its municipal agents employed to accomplish the same end.

This was a severe rule, full of hardships and injustice,—that an act done under lawful authority, if done in a proper manner, would not subject the party doing it to an action, whatever the consequences might be, in the absence of any actual taking of the property of the injured party. It opened wide the door for the most monstrous invasions of the rights of the private property of the citizen under the authority conferred by legislature on corporations, especially municipal and railroad, and resulted in the adoption of those provisions now found recorded as Section 235 of the Constitution of Alabama 1901. But, as heretofore pointed out, such provisions do not apply to the State of Alabama.

I, therefore, find myself faced with the sole question of whether the facts, as stated by you in your inquiry, constitute a taking of private property for public use, as such term is used within Section 23 of the Constitution of Alabama 1901.

In my judgment, answer to such question is found within the opinion of the Supreme Court, rendered in the case of *City Council of Montgomery v. Maddox*, 89 Ala. 181, 7 So. 433, the facts there being decidedly analogous to those here considered, and the court in its opinion holding that the damage or injury suffered was consequential in nature and that relief could only be had by virtue of the provisions of Section 235, *supra*.

As I have heretofore pointed out, the provisions of such constitutional section are not applicable to the State of Alabama and, hence, I am of the opinion that the State is not liable for the damage mentioned in your letter of inquiry. It seems clear from the facts related by you in your inquiry, and from the decisions above cited, that the injury suffered by the property owner here mentioned did not involve a taking of any of the property of the injured party within the meaning of Section 23 of the Constitution of Alabama 1901, but that the damage suffered was

consequential in nature, protected only by the provisions of Section 235 of the Constitution, which are inapplicable to the State of Alabama.

As stated by Chief Justice Gardner in the opinion of the Supreme Court, rendered in the **Brock Case**, *supra*:

"If complainants suffer loss as a consequence of this project, as their testimony tended to show, it is a matter much to be regretted, and presents very naturally a sympathetic appeal. But as we view it, the damages suffered are like those consequential damages referred to in our decisions which had to be borne by the property owner prior to the amendment of our Constitution in 1875, and described as 'loss, not injury; inconvenience, not wrong,—to which every citizen must submit * * * for the public good.' *City Council of Montgomery v. Maddox*, *supra* (89 Ala. 181, 7 So. 434). If hardship results, recourse cannot be had to Section 235 of the Constitution and injunctive relief as here sought. As we understand this case, the legal principles applicable are clear and our duty plain."

I am, therefore, of the opinion that the State of Alabama is not liable for the injury or damage mentioned by you in your request for opinion.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

September 29, 1949.

Hon. Ed E. Reid,
Executive Director,
The Alabama League of Municipalities,
Fourteen South Hull Street,
Montgomery, Alabama.

Municipalities—Taxation—Ad Valorem Taxes—Exemptions.

Parking meters purchased by the city of Cullman under a conditional sales contract are not subject to ad valorem taxes.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of September 7, 1949, is as follows:

"Some time ago I filed with your office a request for an opinion with reference to the question of whether parking meters operated

by a municipal government are subject to being assessed and cited for payment of State and County ad valorem taxes. I understand the request was misplaced and I would like to file this as a substitute for it.

"The Tax Equalization Board of Cullman County has called on the City of Cullman to show cause why its parking meters should not be subjected to State and County Taxes. The contention of the County Equalization Board is that the meters do not actually belong to the City of Cullman until all conditions of a lease sale agreement have been complied with. One of the provisions is that the meters shall be paid for out of their earnings. It takes about two or three years for the meters to earn enough income to pay for themselves. The Tax Equalization Board contends that during the time the meters are being paid for out of their earnings that they are actually the property of the Karpark Corporation—the manufacturers who sold them to the city.

"I send you herewith a copy of the sale agreement under which the meters were bought by the City of Cullman. I hope you will check this agreement and also give us your opinion as to whether or not items bought on this kind of arrangement are subject to State and County taxes."

The proposal made by the Karpark Corporation to the city of Cullman on October 28, 1947, and accepted by the city on the same date is a conditional sales contract by the terms of which contract the proposal was made a part thereof.

Under the provisions of Section 14 of the proposal, the city obligated itself to pay for the parking meters solely out of the revenue derived from the operation of the same. Under the provisions of Section 15 of the proposal, the corporation retained title to the meters until they were fully paid for, and agreed, upon payment in full, to execute a bill of sale to the city, conveying title to the same. Section 16 of the proposal provides that if the city fails to perform any of the conditions undertaken by it by the terms of the contract the corporation may repossess the meters.

In the case of *State v. White Furniture Company*, 206 Ala. 575, 90 So. 896, the court had under consideration a contract similar to the one here involved. In this case, the court held that, under the provisions of Section 44 of the Revenue Act of 1919 (General Acts 1919, page 229), requiring that all property be assessed to the owner, personal property, as well as real property, in the possession of a vendee under a conditional sales contract was assessable for taxation to the vendee. In this case, the court said:

"So, when a statute requires that property be assessed to the owner, we think it means the general and beneficial owner—that is,

the person whose interest is primarily one of possession and enjoyment in contemplation of an ultimate absolute ownership—and not the person whose interest is primarily in the enforcement of a collateral pecuniary claim, and does not contemplate the use or enjoyment of the property as such.”

See also, 51 Am. Juris., Taxation, Section 432; 110 A. L. R. 1499.

Section 44 of the Revenue Act of 1919 considered in the *White* case, *supra*, now appears, without changes here pertinent, as Title 51, Section 39, Code of Alabama 1940.

In view of the above authorities, it is my opinion that the parking meters under consideration are not subject to taxation, the property of the city not being subject to taxation under the provisions of Constitution of Alabama 1901, Section 91. Further, real and personal property of municipal corporations is exempt from taxation under the provisions of Title 51, Section 2, Code of Alabama 1940, as amended by Act No. 639, General Acts 1947, page 491.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

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